93-272

No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATRICIA K. SULCER,

Petitioner,

v.

THE CITIZENS BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, JOHN A. BARRETT, JR., JAMES YOUNG, BOB DAVIS, AND HILTON MELOT.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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178 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal district courts have jurisdiction over a claim brought under the Indian Civil Rights Act by a non-Indian employee if the tribal remedies are completely foreclosed due to claimed sovereign immunity by tribal officials.

2. Whether, the ICRA or other enacted federal statutes or regulations apply to non-Indian or Indian employees of the tribe and should the federal courts provide a forum after the tribal forum refuses to consider the claim.

3. Whether the Indian Civil Rights Act, when adopted by the tribal constitution, affords equal access and equal protection to all Indian or non-Indian citizens of the United States in federal district court if the tribal court forum is completely foreclosed due to claimed sovereign immunity by tribal officials.

II

PARTIES TO THE PROCEEDING

The Parties to the proceeding in the Tenth Circuit are those in the caption, the Petitioner, Patricia K. Sulcer, and the following defendants below and Respondents to this petition (listed as they appeared in the style of the case):

Citizen Band Potawatomie Indian Tribe, (The Tribe)

John A. Barrett, Jr.

James Young

Bob Davis

Hilton Melot

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Patricia K. Sulcer (Ms. Sulcer) requests that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit entered in this action on February 18, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals[1] (Pet. App. A-1-12) is unreported. The opinion of the District Court (Pet. App. A12-20) is also unreported. The opinion of the Tribal Supreme Court (Pet. App. A-21-64) is reported at 17 Ind.L.Rptr. 6138 (C.B. Pot. Sup Ct. 1990).

JURISDICTION

The opinion of the Court of Appeals (Pet. App. A-1-12) was entered on February 18, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1). An extension of time was granted on May 24, 1993 to file a Petition for Writ of Certiorari; an additional extension was granted on June 24, 1993 allowing Petitioner until July 8, 1993 to complete and file her Petition.

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[1] The opinion of the Court of Appeals was unpublished and without precedential value.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United State Constitution, Amendment V:

No person shall ... be deprived of life, liberty, or property, without due process of law ....

25 U.S.C. § 450(h), Indian Self-Determination

Contracts and grants with tribal organizations ... shall include provision to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

28 U.S.C. § 1331, Federal question,

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1343(a)(4), Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action

authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the rights to vote.

25 U.S.C. § 1301(1)(2)(3), Definitions

For purposes of this subchapter, the term-

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction

over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense;

25 U.S.C. § 1302 (8), Constitutional rights

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

25 U.S.C. § 450h (a)(1), Grants to tribal organizations or tribes

(a) Request by tribe for contract or grant by Secretary of the Interior for Improving, etc., tribal governmental, contracting, and program planning activities.

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to sections 13 and 52a of this title, and any Act subsequent thereto) to contract with or make a grant or grants to tribal organization for-

(1) the strengthening or improvement of

tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

25 U.S.C. § 450f(a), Contracts by Secretary of the Interior with tribal organizations

(a) Request by tribe for contract by Secretary to plan, conduct and administer education, etc., programs; refusal of request

The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in sections 452 to 457 of the title, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the

benefit of Indians under sections 13 and 52a of this title, and any Act subsequent thereto: Provided, however, That the Secretary may initially decline to enter in to any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract,

(E) adequately trained personnel, or (F) other necessary components of contract performance.

25 CFR Ch. 1, § 271.15(a), Criteria for declining to contract

(a) The Commissioner may decline to contract only for the specific causes given in paragraph (b) of this section. The burden of proof is on the Commissioner to demonstrate, through substantial evidence, that one of the specific grounds for declination exists and that, therefore, the application must be declined.

25 CFR Ch. 1, § 271.15(c)(5)(i), Criteria for declining to contract

(c) In arriving at his finding, the Commissioner shall consider whether the tribal organization would be deficient in performance under the contract with respect to the factors listed in this paragraph.

(5) Adequacy of trained personnel. The adequacy of trained personnel available to the tribal organization to carry out the

proposed contract will be presumed if any of the following conditions exist:

(i) If the tribal organization has a personnel system that prescribes minimum occupational qualifications standards which insure equal access to all qualified tribal members; procedures for the selection of personnel on the basis of such standards; and the personnel to be used under the proposed contract are to be employed under the personnel system.

25 CFR Ch. 1, § 271.15(c)(6)(i)(A), Criteria for declining to contract

(c) In arriving at his finding, the Commissioner shall consider whether the tribal organization would be deficient in performance under the contract with respect to the factors listed in this paragraph.

(6) Other necessary components of contract performance. (i) All other necessary components of contract performance will be deemed to be met unless a tribal

organization:

(A) Does not agree to develop an adequate personnel system that provides selection standards which insure equal access to all qualified tribal members;

STATEMENT OF THE CASE

Petitioner, Patricia K. Sulcer, was an employee in good standing for six (6) years working as the Director of the communications department as well as editor of the tribal newspaper.[2] The Tribe had adopted a tribal constitution, a personnel policy manual and various laws governing the operation of tribal government all of which applied to Ms. Sulcer's employment.

Without any notice or opportunity to be heard, the members of the tribal business committee composed of the individual respondents, voted to terminate Ms. Sulcer's employment immediately without any just cause. This meeting was held without notice, agenda or any opportunity to respond, all in contravention of the tribal constitution and

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[2] Ms. Sulcer was editor of the tribal newspaper HOW-NI-KAN which had received numerous awards from the Native American Press Association through the efforts of her work. (Pet. App. A-133)

the adopted personnel policy manual and related Tribal ordinances.[3]

The proceedings below. Ms. Sulcer's action commenced in tribal court against the four individual members of the tribal business committee in their individual capacities. Ms. Sulcer sought injunctive relief as well as damages for the alleged improper conduct by the individual respondents allegedly motivated by personal interests rather than tribal interest. The individual respondents filed a Motion to Dismiss based upon the doctrine of "Sovereign Immunity". The tribal court sustained the motion and dismissed the action. Ms. Sulcer appealed to the Tribal Supreme Court which limited their review to the issue of sovereign immunity. The divided

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[3] Tribal resolution No. 84-37 prohibited members at Business Committee from involving themselves in Staff Administration. Tribal resolution No. 84-93 brought the tribal Personnel Policy into conformity with federal personnel policies (prohibited termination based upon 'Ex Post Facto' violations).

Tribal Supreme Court held without benefit of an evidentiary hearing that the individual respondents were immune from suit. Ms. Sulcer exhausted her tribal remedies having been denied a forum to present her claims under the Indian Civil Rights Act.(ICRA).

The present action was brought in Federal District Court against the individual respondents again alleging that the individuals acted beyond the scope of their authority as business committee members as well as in violation of the Indian Civil Rights Act (ICRA) and rights contained in the United States Constitution, First and Fifth Amendments. Ms. Sulcer alleged that Federal court jurisdiction was based upon 28 U.S.C. § 1331, under deprivation of rights under the United States Constitution and the ICRA. Additional jurisdiction was also premised on 28 U.S.C. § 1343(a)(4) for deprivation of civil rights. Ms. Sulcer plead exhaustion of Tribal remedies and alleged denial of a forum

to be heard. The individual respondents again filed a motion to dismiss based upon the doctrine of sovereign immunity. Ms. Sulcer included the tribe as a defendant due to its position that sovereign immunity denied her a forum in which to proceed even against tribal officials under the ICRA.

The district court found that Ms. Sulcer could prove no set of facts which would provide jurisdiction to the court based upon the concept of sovereign immunity. (Pet. App. A-13, 19) Although, Ms. Sulcer a non-Indian, alleged the individual respondents acted outside the scope of their authority, the District court found that the action was inherently racial which precluded federal court jurisdiction.(Pet. App. A-15) The district court acknowledged Ms. Sulcer's claims that respondents acted outside their authority but relied upon the decision of the

tribal court as controlling.[4] Notice of appeal was filed on February 26, 1992. Jurisdiction of the Court of Appeals was brought pursuant to 28 U.S.C. § 1291.

The Tenth Circuit affirmed the district courts action on February 18, 1993. The Tenth Circuit court held that Ms. Sulcer's action was not cognizable under the ICRA against the tribe due to sovereign immunity. The court pointed out that the only federal remedy under the ICRA was a writ of habeas corpus. (Pet. App. A-5). Additionally, since Ms. Sulcer's action involved a matter of internal tribal affairs, the Tenth Circuit's narrow exception in Dry Creek Lodge, Inc. v. Arapahoe, Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) did not apply.

The Tenth Circuit rejected consideration of whether tribal court's refusal to consider

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[4] Ms. Sulcer alleged a conspiracy of the named individual defendants to deprive her of her employment and due process rights thereunder. (Pet. App. A-18)

Ms. Sulcer's claims against the individual respondents under the ICRA, exceeded the lawful limits of tribal civil subject-matter jurisdiction. (Pet. App. A-8)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a conflict regarding the interpretation and extent a United States citizen (Indian or non-Indian) is protected by the Indian Civil Rights Act or the United States Constitution and federal statutes while employed by an Indian tribe. The Tenth Circuit has construed sovereign immunity to mean that tribal employees are afforded no constitutional or statutory protections against tribal officials. The enactment of the Indian Civil Rights Act is designed to protect citizens from being deprived of their constitutional and statutory rights to due process.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE EXTENT TO WHICH, INCONSISTENT WITH THE CONSTITUTION, INDIAN TRIBES CAN REFUSE A TRIBAL FORUM FOR CONSTITUTIONAL OR ICRA VIOLATIONS.

This case presents the important question of whether a remedy exists for violations of an employee's constitutionally guaranteed protections from the arbitrary and capricious actions of tribal officials under the cloak of sovereign immunity. The question left unanswered by this Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), is whether Indian tribes can deny to American citizens the broad constitutional rights of due process to which citizens, Indian or non-Indian, are entitled.

The indiscriminate use of the concept of sovereign immunity by tribal officials to insulate themselves from scrutiny for deprivations or violations of the basic tenants of constitutional protections of due process afforded both Indians and non-

Indians, under the Fifth Amendment or ICRA, demands that courts affix appropriate relief. See Bell v. Hood, 327 U.S. 678, 684 (1946).

The Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, did not waive sovereign immunity which tribes enjoy from suit. However, the tribes or its officials are clearly limited in their actions regarding certain basic tenants of constitutional freedoms enjoyed by all. The purpose of the ICRA is to provide protection for individuals "from arbitrary and unjust actions of tribal governments" Santa Clara, 436 U.S. at 61, or their officials. The forum is and should be tribal for redressing violations under the ICRA committed by tribal officials. However, sovereign immunity is being used to cloak tribal officials with absolute immunity even

in tribal courts.[4]

This Court established the criteria for review and determination of the extent of tribal court jurisdiction versus complete immunity in National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. 845 (1985).[5] In this instance the tribal court, district court, and the Tenth Circuit

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[4] Justice Pitchlynn of the Tribal Supreme Court in his dissenting opinion (Pet. App. A-59) addressed the issues raised by Ms. Sulcer:

> In order to accept the defense of the Appellees in this case, it would be necessary for this Court to assume that the Citizen Band Potawatomie Indian Tribe is by nature and temperament an arbitrary, capricious body which takes no cognizance of its own laws, policies or other official acts, and which may from day-to-day ignore or violate the same, by a simple majority vote of the Business Committee.
>
> Sovereign immunity cannot, however, be used to defend violation of or continuing conflict with the Constitution and By-laws of the Tribe . . . (Pet. App. A-59-60)

[5] This Court held that to invoke the jurisdiction of the federal district court, it is only necessary to raise a claim under federal law, which protects individual rights. 471 U.S. at 850, 851. Ms Sulcer believes that federal law prohibits the tribes from depriving non-Indians of constitutionally protected rights.

did not consider the enacted tribal constitution and its relevant provisions and limits on the conduct of tribal officials and their actions before deciding the tribe and its officials enjoy immunity from review regardless of their conduct.

The Tenth Circuit is correct when noting this Courts decision in Larson v. Domestic & Foreign Commerce Core, 337 U.S. 682, 695 (1949), that the tribe's immunity is unavailable to the committee members acting beyond their authority.[6] Although Ms. Sulcer alleges this exact fact, the concept of sovereign immunity as interpreted below, prevents the availability of any forum for deprivations under the ICRA or United States Constitution or federal statutes and regulations.

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[6] The Tenth Circuit's decision made no distinction regarding the actions of the individual respondents stating only that even if sovereign immunity is not available, no rights exists for Ms. Sulcer in federal court under the ICRA. (Pet. App. A-5).

Congress passed the ICRA reflecting its overriding interest to ensure certain constitutional rights for tribal members. This Courts opinion in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980) would be controlling, for the proposition tribal sovereignty is limited by the national government and does not authorize tribal officials to deprive Indians or non-Indians of rights protected by the ICRA.

The undisputed facts are that Ms. Sulcer did not have notice or any opportunity to be heard prior to or after her termination from tribal employment. The basic fundamental constitutional principal of notice and hearing, addressed in this Court's decision in Matthews v. Eldridge, 424 U.S. 319, 333 (1976), is lacking in Ms. Sulcer's removal from tribal employment even though such

action is specifically provided.[7] This position is mirrored by the Tribal Supreme Court in its first opinion.[8]

The Tenth Circuit's decision in this case is inconsistent with its published holding in White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984), where it acknowledges that the ICRA creates substantial rights which should be "vindicated through tribal forums which are obliged to apply the statute".

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[7] The tribal constitution provided under Article 16, Section 1(h) that due process shall not be denied. (Pet. App. A-97). The Tribal Personnel Policy Manual describes a provision for notice and an opportunity to be heard. (Pet. App. A-130). Should the Business Committee elect to interfere with Staff Administration their actions must comply with Article 18, Section 2. (Pet. App. A-98). None of which was provided to Ms. Sulcer.

[8] The Tribal Supreme Court in its first published opinion (this action was its second) stated in Kinslow v. Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma, 15 I.L.R. 6007 (C.B. Pot. Sup. Ct., Feb. 17, 1988), that "the concept of due process entails fair treatment under law, a right to notice, and some opportunity to be heard". 15 I.L.R. at 6009. Although the due process is governed under tribal law.

728 F.2d at 1312.

Because of the varying interpretations of the limitations on tribal sovereign immunity and its application to tribal officials, this Court should review the decision of the Tenth Circuit Court of Appeals so that a uniform and consistent standard will be available regarding the tribal forums and application of the ICRA.

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION REGARDING THE PURPOSE OF THE ICRA AS TO WHETHER THE TRIBAL OFFICIALS CAN BE IMMUNE WITHIN THEIR OWN FORUMS.

The purpose of the adoption of the ICRA was, according to this Courts decision in Santa Clara v. Martinez, 436 U.S. 49 (1978), to:

> 'Secure for the American Indian the broad constitutional rights afforded to other Americans', and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments'. 436 U.S. at 61.

The confusion both in Tribal courts and District courts below stems from whether or

not the ICRA has any applicability when tribal officials or the tribal government itself claims immunity within the tribal forum. Such claim of immunity effectively defeats any viability of the ICRA.

This Court in National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. 845 (1985) noted the diminishing effect to the once unlimited power Indian tribes had over their members:

> Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. 471 U.S. at 851.

Respondents through the use of the concept of sovereign immunity essentially void any constitutional or statutory protections to which Ms. Sulcer is entitled under the United States Constitution or even under the Tribal

Constitution which incorporated the ICRA.[9]

Tribal members by Treaty enjoy the protections and guarantees afforded under the United States Constitution.[10] Additionally, they have the guarantees under the concept of self-determination and expect tribal forums to resolve their legal disputes. However, Ms. Sulcer, an employee of the tribe under the doctrine of sovereign immunity has no forum in which to pursue her claims, which if she had been employed by any public employer, especially the federal government,

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[9] United States Constitution, Amendment V, and the Tribal Constitution Article 16(h).(Pet. App. A-97).

[10] Tribal members have had the benefits and detriments of citizenship since 1861. See Treaty With Potawatomi, 1861, 12 Stats., 1191, Article 3 which provided for citizenship; hence, the name "Citizen Band"; also Treaty With Potawatomi, 1867, 15 Stats., 531, Article 6 and Article 8, expansion of citizenship to all tribal members.

would have had a cognizable claim to pursue.[11]

Ms. Sulcer charged the individual respondents with committing an unconstitutional act and acts in violation of the tribal personnel policy and procedure manual. According to this Court's decision in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) such charges are not protected by sovereign immunity. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) (This Courts general rule on whether suit is against government).

The Ninth Circuit Court of Appeals in Kennerly v. United States, 712 F.2d 1252 (9th Cir. 1983) noted that individual tribal

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[11] Had Ms. Sulcer been a federal employee the provisions of 5 U.S.C. § 551 et seq. and 5 U.S.C. § 701 et seq., which are the embodiment of the Administrative Procedure Act, would have been available to her. Not withstanding, Ms. Sulcer was paid by federal funds through indirect costs allotments; she was entitled to due process.

defendants "do not have the same immunity as the tribe itself". The Ninth Circuit also concluded that tribal court under the ICRA was the proper forum. 712 F.2d at 1259.

The Tribe is subject to the same limitations and restraints as those which are imposed on the United States Government by the Constitution. The Ninth Circuit Court of Appeals addressed the ICRA in Randall v. Yakama Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) and noted that the ICRA was designed "to transmit federal constitutional protection to those individuals subject to tribal jurisdictions". 841 F.2d at 899.

This Courts recent decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe of Oklahoma, 111 U.S. 905 (1991) specifically notes that individuals or officers of the tribe are not liable for damages. 111 U.S. at 912. See Ex parte Young, 209 U.S. 123 (1908). Justice Stevens in his concurring opinion stated:

> In my opinion all governments - federal, state and tribal- should generally be accountable for their illegal conduct...
>
> My purpose in writing separately is to emphasize the Courts holding in effect rejects the argument that this government -the tribe- is completely immune from legal process. 111 U.S. at 913.

The ICRA was designed to limit the unbridled and unchecked power of tribal officials, not simply to provide some nebulous rhetoric that has no true meaning especially for those tribes who are now increasingly entering into commerce and employing both Indian and non-Indian citizens who expect their basic constitutional rights to be observed.[12]

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[12] Justice Pitchlynn noted in his dissenting opinion the purpose of the laws and regulations that had been passed to avoid such actions alleged by Ms. Sulcer. The tribe's ventures included "a multi-million-dollar-bingo enterprise, the ownership and operation of a golf-course, and the purchase of the majority interest in a local bank". (Pet. App. A-61)

III. THE DOCTRINE OF SOVEREIGN IMMUNITY CONFLICTS WITH CONGRESSES INTENDED LIMITS ON THE ABILITY OF THE TRIBES TO GOVERN THEMSELVES.

The adoption of the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 et seq. reflects Congresses' intention to guide tribal organizations and operations. 25 U.S.C. § 450f. The Tribe pursuant to 25 U.S.C. § 450h (1), adopted a Personnel Policy manual (Pet. App. D) establishing a codified personnel system governed by a Tribal Administrator. The Personnel Policies are required as a condition of funding by funding agencies. Specifically, 25 CFR § 275.15(a) and § 271.15 (c)(5)(i) and § 271.15(c)(6)(i)(a) govern that the adoption of a personnel policy manual is required. Ms. Sulcer could reasonable expect that the respondents would adhere to such federal requirements similar to those now applicable

to the federal government.[13]

The individual respondents are not immune for violation of federal requirements that apply to tribal government. To allow tribal officials to act under the cloak of sovereign immunity within the tribes own forum allows all such actions to go unchecked in the absence of any meaningful recourse.

The Tribal Constitution incorporated the provisions of 25 U.S.C. § 1302 (8) at Article 16, sub-section (h), stating that the tribe shall not:

> Deny to any person within its jurisdiction equal protection of its laws or deprive any person of liability or property without due process of law. (Pet. App. A-97)

This Courts decision in Oklahoma Tax Commission v. Potawatomi Tribe, 111 U.S. 905 (1991), specifically noted:

> We have never held that individual

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[13] Federal employees must comply with appropriate federal regulations and/or 5 U.S.C. § 551 et seq. and 5 U.S.C. § 701 et seq.

> agents or officers of a tribe are not liable for damages in actions brought by the State. See Ex parte Young, 209 U.S. 123 (1908), 111 U.S. at 912.

Justice Stevens in his concurring opinion stated that all governments, including tribal, should be accountable and the tribe is not completely immune from legal process. 111 U.S. at 913.

The concept of sovereign immunity as thus far applied denies Petitioner any forum to bring an action against tribal officials for violations of equal protection and due process rights. Continued adherence to such a concept will allow tribal officials to violate such protected rights of any citizen, Indian or non-Indian. Petitioner did not relinquish any of her constitutional rights by being an employee of a tribe.

Implicit in the statutes and regulations is the concept that tribal government must comply with its constitution, tribal resolutions and administrative procedures;

all of which in this instance provided requirements for some notice and opportunity to be heard. This Court delineated the basic rights due a public employee in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). The Federal regulations requiring establishment of a personnel plan encompasses those concepts as required by this Court in Loudermill. Sovereign immunity as applied in this case completely negates those concepts and allows tribal officials to do what no state or federal official can - **'violate constitutionally protected rights of citizens'** at will.

Petitioner assents that Congress did not intend that tribal officials could act without recourse in any forum. As Justice White noted in his dissenting opinion in Santa Clara v. Martinez, 436 U.S. 49 (1978):

> My reading of the statute and the legislative history convinces me that Congress did not intend to deny a private cause of action to enforce the rights granted under §

1302. 436 U.S. at 74.

Nor should tribal officials be allowed to recruit non-Indian employees and subsequently deny their rights conferred by citizenship solely because they are employees of the tribe.

As the Ninth Circuit Court of Appeals noted in its opinion in Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977), Congressional intent was to impose the same due process limitations and requirements on tribal governments as are applied to the United States. 564 F.2d at 364.

Sovereign immunity when claimed by tribal officials within the tribal court systems completely undermines the purpose and effect of the ICRA. The passage of the ICRA is an excepting provision designed to protect self-determination and autonomy by avoiding self-destruction. What is painfully clear is the ICRA's designed purpose to prevent the arbitrary and unjust actions by tribal

officials is lost through the constant abuse of the immunity concept.

This Court acknowledges an important exception exists under the doctrine of immunity when explaining that an officials unconstitutional acts are not those of the government. As the government cannot justify or condone any such act, the official is without immunity protection. Pennhurst State School and Hospital, et al. v. Halderman, et al., 465 U.S. 89, 102 (1984).

Ms. Sulcer has been denied access to the front door of the courthouse in any forum to present her evidence and claims due the improper interpretation of sovereign immunity. There is no logical legal rationality to justify the enforced abrogation of constitutionally protected rights for the sole reason that Ms. Sulcer worked for an Indian tribe.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PATRICIA K. SULCER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**No. 92-6079**
	)	**(D.C. NO. CIV-91-**
	)	**1170-C)**
ROBERT F. DAVIS, HILTON MELOT, THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA and JOHN A. BARRETT, JR.,	)	**(W.D. Okla.)**
	)	
Defendants-Appellees,	)	
	)	
and	)	
JAMES A. BARRETT, JR. and JAMES YOUNG,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT*

Before TACHA and BALDOCK, Circuit Judges, and BROWN,** Senior District Judge.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.34(a); 10th Cir. r. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Patricia K. Sulcer brought an action in tribal court against members of the Citizen Band Potawatomi Indian Tribe Business Committee after she was terminated from her position as Director of the Communications Department and newspaper editor. The tribal court concluded it lacked jurisdiction on grounds of sovereign immunity. She then commenced this action in federal district court against the committee members and the tribe, alleging her

termination was in violation of tribal law and the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341, because it was without cause or due process, and because the business committee members lacked authority to terminate her. She asserted that the federal district court had jurisdiction under the ICRA, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. §§ 1983 and 1985, and requested damages, back pay, and front pay or, alternatively, reinstatement.

The district court concluded that the tribe was entitled to sovereign immunity, that plaintiff failed to show the individual defendants acted outside the scope of their authority when they terminated her and they were therefore protected by sovereign immunity, and that the tribal court correctly determined it lacked jurisdiction over plaintiff's action. Plaintiff challenges these rulings. We review de novo a dismissal for lack of subject matter jurisdiction.

Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166, 1168-69 (10th Cir. 1992). We affirm.[1]

I. Indian Civil Rights Act

The Supreme Court held in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978), that the ICRA did not waive the sovereign immunity that Indian tribes enjoy. Thus, the district court correctly held that it had no jurisdiction over the ICRA claim against the tribe.

A tribal officer is entitled to sovereign immunity if his actions are within the scope

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[1] Defendants have moved to strike certain documents that were attached to plaintiff's brief and references thereto in her brief on the ground that the documents were not part of the record before the district court. Having received no objection from plaintiff, and having reviewed the record and finding no indication that these documents were submitted to the district court, we grant the motion. We will disregard these attachments and the references to them in plaintiff's brief. See In re Inspection of Norfolk Dredging Co., 783 F.2d 1526, 1532 n.7 (11th Cir.), cert denied, 479 U.S. 883 (1986).

of his authority. Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 527, 576 (10th Cir. 1984) (Mckay, J., concurring) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 695 (1949)). The defendant business committee members are immune from suit under the ICRA in federal court if the action they took that resulted in plaintiff's termination was within the scope of their authority. However, even if they are not protected by sovereign immunity, there is no cause of action against them under the ICRA in federal court. Santa Clara Pueblo, 436 U.S. at 72. See also Wheeler v. Swimmer, 835 F.2d 259, 261 (10th Cir. 1987) ("The only federal relief available under the Indian Civil Rights Act against a tribe or its officers is a writ of habeas corpus.").

Plaintiff, relying on Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert denied, 449 U.S. 1118 (1981), argues that because the tribal

forum has been denied to her, she is entitled to seek relief in federal court. We disagree. We held in Dry Creek Lodge that the plaintiffs could maintain an action in federal court against a tribe under the ICRA notwithstanding sovereign immunity. Id. at 685. This exception has been narrowly construed to apply only where the dispute does not concern internal tribal affairs, the plaintiff is a non-Indian, and tribal remedies have actually been denied to the plaintiff. Nero v. Cherokee Nation, 892 F.2d 1457, 1460 (10th Cir. 1989). The fact that plaintiff is a non-Indian and was denied access to the tribal forum is insufficient under Dry Creek Lodge because the dispute here involves a matter of internal tribal affairs. See id. n.5. ("tribal sovereign immunity may preclude federal court jurisdiction over non-Indian complaints brought under the ICRA even if tribal remedies are unavailable."). The district

court correctly dismissed the ICRA claim against the committee members.

II. Section 1331

Plaintiff contends that the tribal court improperly dismissed her action on jurisdictional grounds because it was the proper forum "to vindicate rights created by the ICRA." Santa Clara Pueblo, 436 U.S. at 65. National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985), held that federal courts have jurisdiction under 28 U.S.C. § 1331[2] to determine "whether a tribal court has exceeded the lawful limits of its jurisdiction." This is because the question whether a tribal court has power to compel a non-Indian to submit to its jurisdiction "must be answered by reference to federal law and is a 'federal question' under § 1331."

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[2] This section provides, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

471 U.S. at 852 (footnote omitted).[3]

"[I]n cases encompassing the federal question whether a tribal court has exceeded its lawful limits of jurisdiction involving an exercise of civil subject-matter jurisdiction . . . the federal district court is empowered to review a tribal court decision under 28 U.S.C. § 1331." Superior Oil Co. v. United States, 798 F.2d 1324, 1329 (10th Cir. 1986).

Sovereign immunity is a jurisdictional issue. Nero, 892 F.2d at 1459 n.2. However, after reviewing the proceedings before the tribal court, we conclude that review is not available under § 1331. The tribal court did not exceed the lawful limits of its civil subject-matter jurisdiction but rather refused to exercise jurisdiction. Further,

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[3] While the Court also held that the question of tribal court jurisdiction must first be decided by the tribal court, 471 U.S. at 855, here there is no question that tribal court remedies have been exhausted.

there is no indication that plaintiff alleged any claim under the ICRA in tribal court. Thus, we are not presented with the question whether the ICRA waives a tribe's sovereign immunity in tribal court. Resolution of the sovereign immunity question in the tribal court was limited to deciding whether the business committee members exceeded their authority under tribal law. The jurisdiction issue did not arise under federal law. Jurisdiction under § 1331 is not involved.

III. Section 1343

Plaintiff argues that the federal court had jurisdiction under 28 U.S.C. § 1343 because she pled a cause of action under 42 U.S.C. § 1985. Section 1343(a) (4) provides jurisdiction when a person alleges a claim "under any Act of Congress providing for the protection of civil rights."

Section 1985(3), the subsection on which we presume plaintiff is relying, creates no independent substantive cause of action.

Wheeler, 835 F.2d at 261. Rather, plaintiff must "point to independent substantive rights enforceable in the federal courts to state a claim under section 1985(3)." Id. at 262. Plaintiff asserts that 42 U.S.C. § 1983 applies to her. We Disagree.

[N]o action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. . . . As the purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth amendment, it follows that actions taken under color of tribal law are beyond the reach of § 1983, and may only be examined in federal court under the provisions of the Indian Civil Rights Act.

R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983))(citations omitted), cert. denied, 472 U.S. 1016 (1985). The federal court did not have jurisdiction under § 1343.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court
Wesley E. Brown
Senior District Judge

APPENDIX B

IN THE UNITED STATE DISTRICT COURT OF THE WESTERN DISTRICT OF OKLAHOMA

PATRICIA K. SULCER.	)
	)
Plaintiff,	)
	)
v.	)**No. CIV-**
	)**91-1170-C**
	)
CITIZEN BAND POTAWATOMI INDIAN TRIBE, JOHN A. BARRETT, JR., JAMES YOUNG, BOB DAVIS, and HILTON MELOT,	)
	)
Defendants.	)

ORDER

I. INTRODUCTION

At issue is specially appearing defendants Citizen Band Potawatomi Indian Tribe of Oklahoma, John A. Barrett, Jr., Bob Davis and Hilton Melot's motion filed November 27, 1991. This motion also affects defendant James Young even though he did not file a response because the Court finds that it is without subject matter jurisdiction. Plaintiff Patricia K. Sulcer responded on November 27, 1991. Defendants replied on

January 2, 1992.

II. STANDARD FOR MOTION TO DISMISS

It is well established that a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. Haines v. Kerner, 404 U.S. 519, 521 (1972); Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976). In the context of a motion to dismiss, the Court must construe the challenged pleadings in the light most favorable to the plaintiff, must accept as true all well-pleaded factual allegations and reasonable inferences from them, and can disregard all conclusionary allegations. Mitchell v. King, 537 F.2d at 386; see Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Moreover, appellate courts urge caution regarding motions to dismiss and the Tenth Circuit has consistently recognized "the

judicial system's strong predisposition to resolve cases on their merits." Hancock v. City of Okla. City, 857 F.2d 1394, 1396 (10th Cir. 1988); accord Meade v. Grubbs, 841 F.2d 1512, 1520-21 n.7 (10th Cir. 1988). "'[T]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim.'" Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986) (quoting Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)); see Fed. R. Civ. P. 12 (b)(6). A motion to dismiss is a harsh remedy that must be carefully scrutinized to effectuate the spirit of the liberal pleading rules but also to protect the interest of justice. Morgan, 792 F.2d at 978. Finally, leave to amend pleadings shall be freely given when justice so requires. Fed. R. Civ. P. 15(a).

III. ANALYSIS

Defendants argue that this case is controlled by Wardle v. Ute Indian Tribe, 623

F.2d 670, 672 (10th Cir. 1980) (holding that non-tribal member cannot sue tribe for employment-based discrimination under Title VII or 42 U.S.C. §§ 1981, 1983, 1988); see Chapoose V. Hodel, 831 F.2d 931, 934 (10th Cir. 1987) (Title VII specifically excludes Indian tribes) (citing 42 U.S.C. § 2000e (b)(1) ("The term "employer" . . . does not include an Indian Tribe.")); see also Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 318-19 (10th Cir. 1982) (Title 28 U.S.C. §§ 1331, 1343 (a) (4) do not confer jurisdiction over Indian tribes except for habeas corpus relief.). Although plaintiff asserts that her complaint is not based on race, the Court finds that plaintiff is a non-Indian who is suing for being maliciously and wrongfully terminated as an employee of Citizen Band Potawatomi Indian Tribe of Oklahoma. This suit is therefore inherently racial in character. Defendants are the tribe and four individuals who were

members of the Tribe's Business Committee and were involved in the termination of plaintiff while acting in their official capacity.

The Court finds that it does not have jurisdiction over this action due to sovereign immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (Indian tribes possess "common-law immunity form suit traditionally enjoyed by sovereign powers."); Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1459 (10th Cir. 1989) (waiver of sovereign immunity must be expressed, not implied); R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 981-82 (9th Cir. 1983) (Title 25 U.S.C. §§ 1301-41 (Indian Civil Rights Act) does not provide authority for bringing a civil action in federal court to request relief other than for habeas corpus, nor can 42 U.S.C. § 1983 be construed to apply to Indian tribes), cert. denied, 472 U.S. 1016 (1985). But see Dry Creek Lodge, Inc. v Arapaho & Shoshone Tribes, 623 F.2d

682, 683-85 (10th Cir. 1980) (split panel decision) (holding the non-Indian plaintiffs were entitled to a remedy from foreclosure because egregious circumstances do not concern the internal affairs of the tribe and there was no tribal remedy available.), cert denied, 449 U.S. 1118 (1981), declined to follow by, Williams V. Pyramid Lake Paiute Tribe, 625 F. Supp. 1457, 1458 (D. Nev. 1986) ("[A] federal court has no jurisdiction to enjoin violations [of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03] or to award damages for violation of that Act." "[T]here is no federal legislation which grants the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." "Dry Creek is not the law of this circuit, nor is it the law of the United States."), and limited by Nero V. Cherokee Nation of Okla., 892 F.2d 1457, 1460 & nn.4-5 (10th Cir. 1989) (the Dry Creek Lodge exception is to be narrowly

construed and thus must involve only egregious circumstances that do not involve internal tribal affairs and is applicable only where no tribal remedy is available); see also Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes, 623 F.2d at 685-86 (Holloway, J., dissenting).

The only way that this Court would find subject matter jurisdiction is if plaintiff could show that the tribe acted outside its authority. See Tenneco Oil v. Sac & Fox Tribe of Indians of Okla., 725 F.2d 572, 576 (10th Cir. 1984) (per curiam) (McKay, J., concurring). While plaintiff had made allegations in this regard by asserting that she was wrongfully terminated due to her divorce from a Tribal member and because of statements she wrote in a Tribal newspaper, this issue has previously been decided adversely to plaintiff in the Tribal forum. See Sulcher v. Barrett, 17 Indian L.R. 6138, 1641 (Okla. 1990) (S. Ct. Citizen Band

Potawatomi Indians of Okla.) (holding that there was no jurisdiction because of finding that members of Business Committee were acting within their scope of authority when they fired Sulcer). This Court likewise finds that plaintiff fails to state a claim with regard to alleging that the defendants acted outside the scope of their authority when they terminated her.

Under 28 U.S.C. § 1331, this Court can assume jurisdiction only in the limited sense of determining whether the Tribal Court correctly found that it did not have jurisdiction due to sovereign immunity. See Williams v. Pyramid Lake Paiute Tribe, 625 F. Supp. at 1459. This Court finds that the Tribal Court's determination of a lack of jurisdiction was correct in this purely tribal matter regarding a tribal employment decision. Consequently, this Court has no subject matter jurisdiction over the cause of action.

IV. CONCLUSION

Accordingly, defendants' motion to dismiss is **GRANTED** with prejudice with regard to all defendants.

IT IS SO ORDERED THIS 27TH DAY OF JANUARY 1992.

ROBIN J. CAUTHRON
UNITED STATED DISTRICT JUDGE

APPENDIX C

No. 89-01

IN THE SUPREME COURT
CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA

PATRICIA K. SULCER,

Appellant,

v.

JAMES A. BARRETT, JR., JAMES YOUNG, ROBERT F. DAVIS, and HILTON MELOT,

Appellees.

OPINION OF THE COURT

Appearances of Counsel:

David J. Batton, Esq.
Norman, Oklahoma
Attorney for Appellant.

Michael Minnis, Esq.
Oklahoma City, Oklahoma
Attorney for Appellees.

BIG EAGLE, J. filed the majority opinion for the Court in which PIPESTEM and THOMPSON, JJ. concur.

RICE, C.J. filed a separate opinion concurring in the judgment.

PITCHLYN, J. filed a dissenting opinion in which Justice Stepson joined.

HENSON, J. did not participate in the determination or decision of this action.

IN THE SUPREME COURT
CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA

PATRICIA K. SULCER,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. 89-01**
	)	
JAMES A BARRETT, JR., JAMES YOUNG ROBERT F. DAVIS, and HILTON MELOT,	)	
	)	
Appellees.	)	

OPINION OF THE COURT

Appearances of Counsel:

David J. Batton, Esq., Norman, Oklahoma, Attorney for Appellant.

Michael Minnis, Esq., Oklahoma City, Oklahoma, Attorney for Appellees.

BIG EAGLE, J. The facts are not in dispute. The plaintiff, appellant, had been employed by the Citizen Band Potawatomi Indian of Oklahoma for 6 years. She had a good work record until she was notified on July 26, 1989 by her supervisor, the tribal administrator, that the Business Committee

had voted to terminate her employment.[1]

Plaintiff filed a complaint August 11, 1989 for wrongful termination and sex discrimination. The discrimination issue has been abandoned. Defendants, appellees, filed a motion to dismiss on September 6, 1989. The motion was heard September 7, 1989 "upon plaintiff's request for a restraining order against defendants.
This hearing was preceded by neither a motion nor supporting brief.[2]

Defendants filed a special appearance and motion to dismiss based on lack of jurisdiction under the doctrine of sovereign immunity.

The Business Committee are elected officials who act for the Tribe and are

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[1] There may have been an issue concerning actions by the Tribal Administrator, but appellant did not raise it at trial.

[2] There may have been procedural irregularities at the trial court level which did not have change the outcome of this case.

immune from prosecution or subject to prosecution the same as the Tribe.

The question before this Court is whether the trial court was correct in dismissing this cause on the ground of sovereign immunity. We affirm the trial court.

Appellant's Contentions

The appellant, plaintiff at trial, attempts to raise numerous issues for the first time on appeal. The Supreme Court's scope of review is limited to determination only of whether the trial court's action s were procedurally proper and substantively sound.

Appellant asserts numerous errors by the trial court all based on the premise that the defendants are liable as individuals. Appellant contends that the alleged wrongful act of terminating her employment was done by the defendants as individuals, not as members of the Business Committee.

Appellees' Contentions

Appellees raise sovereign immunity as a bar to prosecution of this case. They contend that this suit attempts to circumvent the doctrine of sovereign immunity by naming the defendants as individuals instead of as Business Committee members.

Analysis

The threshold question is whether the trial court erred in dismissing this suit because the act complained of was done by Citizen Band Potawatomi Indian Tribe of Oklahoma Business Committee members. If the act was done by the Business Committee within their authority the Court has no jurisdiction.

Appellant's argument that she was fired by the named individuals and not the Business Committee is not logical and not correct. Neither these defendants nor any other group of individuals can hire or fire tribal employees. As individuals each of them would have no more authority to terminate her

employment than the colloquial "person on the street." Tribal employment is determined by individuals acting on behalf of the tribe either as elected officials or staff members. The defendants must have been sued in their capacity as elected officials, because they have no power to determine her employment except as Business Committee members.

The role of the defendants, therefore their potential liability, is clarified further upon consideration of the relief appellant seeks. She seeks back pay from her former employer, the Tribe. The named defendants did not hire her, pay her or fire her and as individuals would not be liable for back pay. From the perspective of relief sought this is also a suit against Business Committee members, not a group of individuals. The sovereign immunity of the Tribe bars prosecution of suit against elected officials of the Tribe so long as they act within their authority.

There was no evidence of the tribe expressly waiving its sovereign immunity.

Therefore this is a suit against the sovereign.

Decision

The Citizen Band Potawatomi Indian Tribe of Oklahoma, like each Indian Tribe, is exempt from suit without Congressional authorization. This is the doctrine of sovereign immunity. The Tribe has not expressly waived its sovereign immunity, and Tribes are immune not only from direct legal action against them without consent, but also they are immune from indirect attempts to sue them by naming their officers as defendants.

IT IS SO ORDERED.

PIPESTEM and THOMPSON, JJ. concur.

RICE, C.J. filed a separate opinion concurring in the judgment.

PITCHLYN, J. filed a dissenting opinion in which Justice Stepson joined.

HENSON, J. did not participate in the determination or decision of this action.

IN THE SUPREME COURT
CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA

PATRICIA K. SULCER,	)
Appellant,	)
v.	)
	) **No. 89-01**
JAMES A BARRETT, JR., JAMES YOUNG ROBERT F. DAVIS, and HILTON MELOT,	)
Appellees.	)

CONCURRING OPINION

MR. CHIEF JUSTICE RICE. While concurring in today's majority opinion, I write separately to explain further the reasons sovereign immunity is applicable in this action. The factual circumstances appertaining to this litigation have been developed in both the majority and dissenting opinions, and need not be reiterated here. Suffice it to state that the precise issues presented by this action are (1) whether the members of the Business Committee of the Citizen Band Potawatomi Indians of Oklahoma when acting in their official capacity are entitled to assert the defense of sovereign

immunity, and (2) if so, whether they are entitled to assert this defense in the circumstances presented by the appellant's pleadings.

PART ONE

A basic tenet of federal Indian law is that Indian tribes possess the common law immunity from suit traditionally attributed to sovereign powers. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Puyallup Tribe, Inc. v. Washington Department of Game, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); United States V. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 109, 63 L.Ed. 291 (1940); Turner v. United States, 248 U.S. 354, 358, 39 S.Ct. 109, 63 L.Ed. 291 (1919). While the doctrine of sovereign immunity is admittedly of European origin, it is entirely consistent with the tribal Constitution and common law, and serves the worthwhile purpose of allowing

tribal officials to make decisions and take action upon matters within the scope of their authority without fear of personal or tribal liability if they err, so long as the manner in which those officials act is consistent with the law and not prohibited thereby.

It is beyond cavil, therefore, that Indian tribes are immune from suit absent express and unequivocal authorization from Congress or the tribal government. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940), quoted in Santa Clara Pueblo v. Martinez., supra; Payallup Tribe v. Washington Department of Game, 433 U.S. 165, 173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); State of Oklahoma v. Choctaw Nation. et al., No. CIV 88-595-A (W.D. Okla. Jan 4, 1989). The United States Supreme Court, speaking through Justice Marshall in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 56 L.Ed.2d 106, 113, 98 S.Ct. 1670 (1978), said:

Indian Tribes are "distinct,

> independent political communities, retaining their original natural rights" in matters of local self-government. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832); see United States v. Mazurie 419 U.S. 544, 557, 42 L.Ed.2d 706, 95 S.Ct. 710 (1975); F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, 122123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." United States v. Kagama 118 U.S. 375, 381-382, 30 L.Ed. 228, 6 S.Ct. 1109 (1886). See United States v. Wheeler, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978). Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. Turner v. United States 248 U.S. 354, 358, 63 L.Ed. 291, 39 S.Ct. 109 (1919); United States v. United States Fidelity and guaranty Co. 309 U.S. 506, 512513, 84 L.Ed. 894, 60 S.Ct. 653 (1940); Puyallup Tribe v. Washington Department of Game 433 U.S. 165, 172-173, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977).

The courts have uniformly recognized the sovereign immunity from suit of Indian tribes and this principle has been uniformly followed. United States v. Mitchell, 455 U.S. 535, 63 L.Ed.2d 697 (1980); Lehman v.

Nakshian 453 U.S. 156, 69 L.Ed.2d 548 (1981); United States v. King 395 U.S. 1, 23 L.Ed.2d (1969); Pennhurst State School & Hospital v. Halderman 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); Larsen V. Domestic and Foreign Commerce Corp. 337 U.S. 682, 93 L.Ed. 1628 (1949); United States v. Sherwood 312 U.S. 584, 85 L.Ed. 1058 (1941); Begay v. Albers 721 F.2d 1274 (10th Cir. 1983); Ramey Construction Company v. Apache Tribe of the Mescalero Reservation 673 F.2d 315 (10th Cir. 1982); Kenai Oil and Gas v. Department of Interior 522 F. Supp. 521 (D. Utah 1981) aff'd 671 F.2d 383 (10th Cir. 1982); Jicarilla Apache Tribe v. Andrus 687 F.2d 1324 (10th Cir. 1982); Boe v. Fort Belknap Indian Community 642 F.2d (9th Cir. 1979); People of the State of California v. Quechan Tribe of Indians 595 F.2d 1153 (9th Cir. 1979); Bottomly v. Passamaquoddy Tribe 599 F.2d 1061 (1st Cir. 1979); Cherokee Nation v. State 461 F.2d 674 (10th Cir. 1972); Twin

Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe 370 F.2d 529 (8th cir. 1967); Maryland Casualty Company v. National Bank 361 F.2d 517 (5th Cir. 1966); Greene v. Wilson 331 F.2d 769 (9th Cir. 1964); Dicke v. Cheyenne-Arapaho Tribe Inc., 304 F.2d 113 (10th Cir. 1962); Whitefoot v. United States 293 F.2d 658 (Ct.Cl. 1961), cert den. 369 U.S. 818 (1962); Native American Church v. Navajo Tribal Council 272 F.2d 131 (10th Cir. 1959); Haile V. Saunooke 246 F.2d 293 (4th Cir. 1957); cert denied, 355 U.S. 893 (1957); Iron Crow v. Oglala Sioux Tribe 231 F.2d 89 (8th Cir. 1956); Adams v. Murphy 165 F. 304 (8th Cir. 1908); Thebo v. Choctaw Tribe 66 F. 372 (8th Cir. 1895); Bruett v. Kuope 544 F. Supp. 301 (S.D. Wis. 1983); City of Salamanca v. Seneca Nation 47 F. Supp 939 (W.D.N.Y. 1942); Yazzie v. Morton 59 F.R.D. 377 (D. Ariz. 1973); White Mountain Apache Tribe v. Shelley 107 Ariz. 4 480 P.2d 654 (1971); Morgan v. Colorado River Tribe 103 Ariz. 425,

443 P.2d 421 (1968); Employment Security Department v. Cheyenne River Sioux Tribe 80 S.D. 79, 119 N.W.2d 285 (1963).

Since the common law immunity of tribes is coextensive with the immunity of the United States and can only be waived by express and unequivocal Congressional or tribal consent, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59, 56 L.Ed.2d 106 (1978); Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972); United States v. United States Fidelity and Guaranty Co., 309 U.S. 506, 84 L.Ed. 894 (1940); Kennerly v. United States, 721 F.2d 1252 (9th Cir. 1983), the defense of sovereign immunity goes to the subject matter jurisdiction of the Court. A sovereign is immune from suit except as it consents to be sued, and the terms of its consent to be sued in any court define that Court's jurisdiction to entertain the suit. United States v. Mitchell 445 U.S. 535, 538, 63 L.Ed.2d 607, 613 (1980); Lehman v.

Nakshian 453 U.S. 156, 160, 69 L.Ed.2d 548, 553 (1981); United States v. Testan 424 U.S. 392, 399, 47 L.Ed.2d 114 (1976); United States v. Sherwood 312 U.S. 584, 586, 85 L.Ed. 1058 (1941); Ramey Construction Company v. Apache Tribe of the Mescalero Reservation 673 F.2d 314 (10th Cir. 1982); Thebo v. Choctaw Tribe 66 F. 372 (8th Cir 1895).

PART TWO

It is black letter hornbook law that litigants cannot emasculate the doctrine of sovereign immunity by bringing Court actions for relief against governmental agents acting on behalf of the sovereign. For the sovereign can act only through its agents, and when a judgment is entered against the sovereign agents, the judgment is a judgment against the sovereign although the judgment is nominally directed against the sovereign's agent. Larsen v. Domestic and Foreign Commerce Corp. 337 U.S. 682, 688, 93 L.Ed. 1628, 1635 (1949); See also Ramey

Construction Company v. Apache Tribe of the Mescalero Reservation 673 F.2d 351 (10th Cir. 1982); (holding that the Inn of the Mountain Gods, a motel operated as a sub-entity of the Tribe, was clothed with the sovereign immunity of the Tribe and was not subject to suit). Therefore, a lawsuit cannot be brought indirectly against the tribe by suing tribal governmental officers or agencies of the United States a trustee for the tribe. Native American Church v. Navajo Tribal Council 272 F.2d 131 (10th Cir. 1959); Thebo v. Choctaw Tribe of Indians 66 F. 372 (8th Cir. 1895); Seneca constitutional Rights Organization v. George 248 F. Supp. 48 (W.D.N.Y. 1972); Barnes v. United States 205 F. Supp. 97 (D. Mont. 1962); Adams V. Murphy 165 f. 304 (8th Cir. 1908); Haile V. Saunooke 246 F.2d 293 (4th Cir. 1957), cert denied 335 U.S. 893 (1957); Kenai Oil and Gas v. Department of Interior 522 F. Supp. 521 (D. Utah 1981) aff'd 671 F.2d 383 (10th cir.

1982); Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979); Bruett v. Kuope 554 F. Supp. 301 (S.D. Wis. 1983).

No express waiver of sovereign immunity has been made in this instance. Since there has been no express waiver of immunity from suit, it is clear that dismissal was proper unless the named defendants were acting outside the scope of their authority or in a manner inconsistent with governing law. Santa Clara Pueblo v. Martinez 436 U.S. 49, 58 56 L.Ed.2d 106, 115 (1978); Puyallup Tribe v. Washington Department of Game 433 U.S. 165, 172-173, 53 L.Ed.2d 667, 674 (1977); United States v. United States Fidelity & Guaranty Co. 309 U.S. 506, 512-513, 84 L.Ed. 894 (1940); Turner v. United States 248 U.S. 354, 358, 63 L.Ed. 291 (1919); Ramey Construction Company v. Apache Tribe of the Mescalero Reservation 673 F.2d 314 (10th Cir. 1982); Jicarilla Apache Tribe v. Andrus 687 F.2d 1324 (10th Cir. 1982); Lynch v. United

States 292 U.S. 571, 78 L.Ed. 1434, 1442 (1934).

PART THREE

Section 2 of Article 7 of the Constitution, in pertinent part, vests the Business Committee with the authority to "enact legislation, transact business, and otherwise speak or acto on behalf of the Citizen Bank Potawatomi Indian Tribe of Oklahoma in all matters on which the Tribe is empowered to act now or in the future." In my opinion, it cannot be reasonably argued that the above quoted language fails to empower the Business Committee to hire and fire tribal employees. The appellant has failed to point out any Constitutional provision which would limit application of the above quoted language to the question of whether the Business Committee can hire and fire tribal employees.

The Business Committee has, however, enacted two statutes which are urged as

limitations upon their authority to terminate the employment of tribal employees. Appellant contends, with some force, that the Tribal personnel policies and Resolution 84-37 (December 5, 1983) preclude the actions herein taken. In light of the allegations that the termination of Appellant was without cause and possibly influenced by ulterior motives, this position is very attractive.

Here the Business Committee did not fire Appellant directly but by motion expressed its desire that the Tribal Administrator (who was also a member of the Business Committee) do so. The Tribal Administrator thereafter terminated Appellant pursuant to that motion. Had this action been filed against a line officer of the Tribe who fired a tribal employee without (allegedly) complying with the Tribal personnel policies or a Business Committee as a whole, I would perhaps reach a different conclusion. Clearly the tribal personnel policies and the cited resolution

are intended respectively to provide procedural protections for tribal employees subjected to disciplinary actions by executive line officers of the Tribe, and against Business Committee members who interfere in tribal employee situations individually and without the authority of formal action by the Business Committee as a whole. The suggestion that personal motives may have played a role in the actions taken by the Appellees is certainly troubling. Almost thou persuadest me.[1]

However, even after additional briefing, I can find no authority for the proposition that either the personnel policies or the cited resolution were specifically intended to apply to the Business Committee acting together in a proper meeting as the

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[1] Because the termination of Appellant apparently was not based upon any alleged malfeasance, I do not reach the issue of whether a due process hearing would be required in the presence of such allegations.

legislative/executive body of the Tribe. Therefore, even if the fact that Appellant was actually terminated from her employment by the Tribal Administrator, who is not a defendant here, is overlooked under the theory that the Business Committee motion "forced" the Tribal Administrator to terminate Appellant, the question simply becomes whether the Business Committee has retained the authority to terminate a tribal employee without cause.

Therefore, while I agree with my Brother Pitchlynn that this Court may take cognizance of administrative actions of tribal officials, including Business Committee members, which violate the Tribal Constitution or laws, I do not find that any of the laws cited to the Court would preclude the Business Committee from firing the Appellant directly with or without cause. Without an express statement that either the personnel policies or Resolution 84-37 apply

to formal Business Committee actions relating the Tribal employees, I find that neither the personnel policies nor Resolution 84-37 bar Business Committee termination of a tribal employee. See, C.B.Pot. Personnel Policy Manual, P.2 (Pot. Res. 86-180, August 13, 1985). Therefore, an additional hearing to determine whether these provisions have been violated would be futile and irrelevant.

If the doctrine of sovereign immunity as recognized in tribal law is to have any meaning, it must shield tribal officials acting within the scope of their authority and in a manner permitted and not prohibited by law -- even if they are absolutely wrong. This rule must also hold true if the Business Committee should take action for political or other reasons, for I do not believe that it is the function of this Court to second guess the motives of elected Tribal officials, but to determine whether the actions taken by them are within the law. Questioning the

motives and politics of the Business Committee is a function of the electorate. Finding no lack of authority or violation of any procedural requirement applicable to the Business Committee as a whole, I therefore CONCUR in the judgment of the Court.

IN THE SUPREME COURT
CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA

PATRICIA K. SULCER,)
)
Appellant,)
)
v.) No. 89-01
)
JAMES A BARRETT, JR., JAMES YOUNG)
ROBERT F. DAVIS, and HILTON MELOT,)
)
Appellees.)

DISSENTING OPINION

Pitchlynn, J. The essential facts in this case are undisputed. The Plaintiff/Appellant was employed by the Citizen Band Potawatomi Indian Tribe of Oklahoma for some six years as Editor of the official Tribal newspaper. She had maintained a good work record until on July 26, 1989, her supervisor, the Tribal Administrator, Dr. Francis Levier, informed her that the Tribal Business Committee had voted to terminate her employment, and that he was informing her of her discharge in fulfillment of those instructions.

Thereafter, Plaintiff filed a complaint in

the Tribal Court of the Citizen Bank Potawatomi Indian Tribe on August 11, 1989 claiming wrongful termination and sex discrimination and naming as Defendants the four Business Committee members who voted for her termination. Dr. Francis Levier, although instrumental in carrying out the termination ordered by the Business Committee, cast the only dissenting vote among its members. The discrimination issue was subsequently abandoned and the Defendants/Appellees filed a Motion to Dismiss on September 6, 1989 which was heard on September 7, 1989 in what appears to have been a hastily scheduled and ill prepared occasion for the argument of this motion, although same was held with the apparent consent and agreement of the parties.

The Defendants' Motion to Dismiss relied upon the argument of lack of jurisdiction under the doctrine of sovereign immunity,

therein culminating the Tribal Court's sustaining Defendants' Motion and Order dismissing the case.

The doctrine of sovereign immunity protects only the authorized acts of public officials, and wnere the protected acts are alleged to be "ultra vires" requires a full determination of the nature of the acts by the Court.

I would reverse the Tribal Court's decision dismissing the action against the individual Defendants and remand for hearing on the merits to determine whether the actions of the individual Defendants were "official acts of the sovereign", or unauthorized by the powers of the official office.

Appellant's Contentions:

The Appellant attempts to raise numerous issues for the first time on appeal which are wholly unnecessary to this decision. The Court thus addresses only the issue of

individual liability of tribal officials in light of the sovereign immunity defense raised and the absence of the Tribe as a party defendant.

Appellant has consistently pleaded, however unartfully, that her wrongful termination complaint is based upon the theory that the decision of the Defendants to terminate her from her position was motivated by the individual and personal interests of the committee members, rather than for the benefit of the Tribe, and that the action was in violation of official Tribal policy and law. By doing so, Appellant has in essence argued that such decision was not the act of the Tribe, but the acts of the individual Defendants acting outside the scope of the power and authority granted to them by the Tribal Constitution and laws and for which they should bear individual responsibility.

Appellees' Contentions:

The Appellees' sole and only defense with which we are presently concerned is the argument that the sovereign immunity of the Tribe acts as a bar to the prosecution of this case. Appellees' contend that the suit attempts to circumvent the doctrine of sovereign immunity by naming the Appellees as individual defendants rather than in their representative capacity as Business Committee members.

Analysis:

The issue for this Court's review is whether the Tribal Court erred in dismissing Appellant's suit on the ground that the suit actually constituted an action against the sovereign, Citizen Ban d Potawatomi Indian Tribe, either directly or indirectly, by naming as defendants the individual members of the Tribal Business Committee. If the act of which the Appellant complains was an official act of the Business Committee, and was fully within the Constitutional and

statutory authority of that body, any such action against the individual Defendants would indeed fail as an action against the sovereign. However, the unauthorized and unlawful acts of governmental officials or employees may bring personal liability as a result thereof. Santa Clara Pueblo v Martinez, 98 S.Ct. 1670, 1677 (1978); Puyallup Tribe, Inc. v. Washington Dept. of Game 433 U.S., at 171-172, 97 S.Ct., at 2620-2621. Such an analysis requires close comparison and even scrutiny of the actions and the purported legal basis for those acts.

The authority of the Court originates in the Tribal Constitution at Article 11, entitled COURTS, AND AT ARTICLE 4, ENTITLED TRIBAL JURISDICTION. At Section 3 of Article 4, the Constitution authorized ". . . appropriate legislation enacted by the Tribe, to establish or provide for a tribal judicial system. . . ." The Tribe has enacted certain Codes and Ordinances which carry out that

Constitutional function.

At Article 11, the Constitution grants general jurisdiction upon Tribal Courts, and more specifically, jurisdiction in all cases arising under the Constitution, laws and treaties of the Citizen Band Potawatomi Indian Tribe. This necessarily includes the power of judicial review of the constitutionality of the legislative enactments of the Business Committee and the Council, (See Section 3, Article 11) as well as the review of administrative action in the application and implementation of said enactments.

Appellees argue for recognition and application by this Court of the ancient doctrine of sovereign immunity, a purely non-Indian concept, as a shield from suit. In the same breath, the Appellees argue that the Court should not recognize modern developments and modifications of the doctrine which provide for judicial review of

administrative actions. (See O'Brien v. Fort Mojave Tribal Court, No. CI-3005-83 (Ft. Moj. Tr. Ct., Dec. 8, 1983 for discussion of the development of the doctrine of sovereign immunity). The Tribal Code has by specific language placed principles of sovereign immunity into play through the Code of Civil Procedure. This Court should choose to take advantage of the experience of the United States Supreme Court by continuing the tempering of this doctrine to the needs of the modern day relationship of the sovereign and its people, and thus affirm the Court's authority to judicially review administrative actions. The Supreme Court is invested with appellate jurisdiction in all such cases. (See Section 2, Article 11).

The Appellant's argument that she was fired by the named individuals in an "ultra vires" act must be necessarily coupled with the argument that the act was unlawful and that said individuals were merely using the

official process and title of the Business Committee to carry out a personal agenda while seeking to conceal their actions and protect themselves behind the shield of governmental authority. In essence, the Appellant has asked that the Tribal Court entertain claims that Tribal officials acted "under color of tribal law" to violate her rights to continued employment and to the protections of staff from political interference which are provided by certain tribal laws. Where such allegations are framed, it is incumbent upon the Tribal Court to provide a forum in which the complaining party may present the evidence which she believes supports her allegations that elected officials have been quilty of an abuse of power and authority and to scrutinize carefully any evidence supporting such claims that might be brought.

It is apparent to this Court that while the defense of sovereign immunity

appropriately protects the Tribe from awards of damages and costs in such an action, the Tribe is not a defendant in this suit and has thus never been so endangered. It was clearly foreseen by the drafters of the Tribal Code that an occasion would arise in which this Court would be required to make a determination of the constitutionality or enforceability of a statute or law of the Tribe regardless of whether the Tribe, and agency, officer of employee was a party in their official capacity. At Section 309(d) of the Code of Civil Procedure of the Potawatomi Tribe, the Code calls for the intervention by the Tribe for the presentation of any evidence admissible in the case and for argument on the question of the constitutionality or enforceability of said law. Although from the evidence presented to this Court, no official legislative enactment was used to carry out the action of the Business Committee against

the Appellant, by virtue of the nature of the act, this Court finds that act to thus be administrative in nature and a proper subject for this Court's determination of the lawfulness thereof.

The Tribal Code further implies at Section 8 that the Tribe, its officers, employees, agents or political subdivisions will be sued in the Tribal Court. By the language of this Section, one could further imply the expectation that certain of those persons or entities, while not liable for court costs or attorneys fees when acting in their official capacity, would otherwise be liable for said costs and fees. Thus it follows, that such parties would also be open to damages that might be awarded therefrom.

The all encompassing application of this defense urged by Appellees for their personal protection is thus highly suspect particularly in light of certain uncontroverted facts of this case regarding

the state of the Tribal law and the action that is the subject of complaint The Constitution provides that the jurisdiction and powers of the Tribe shall be exercised by enacting legislation which shall establish a judiciary, law enforcement agency and other appropriate administrative agencies. (See Article 4, Section 3) The Court is cognizant of the wide range of legislation enacted by the Business Committee and Council in carrying out these governmental functions, and finds that certain of the law must be considered and interpreted as a part of this appeal. The laws established by the Business Committee by official legislative act become the extension of the Constitution and the law of the land unless and until repealed or amended by the same official legislative process or by order of the Court after a finding that conflicts are created therein with the Constitution. Santa Clara Pueblo v. Martinez, supra at headnote 5, 1677.

The uncontroverted facts of particular importance to this Court's review are as follows:

First, it is uncontroverted that the authority over personnel was delegated by the Business Committee to the Tribal Administrator on June 30, 1985 by the Tribal Resolution 86-166.

It is uncontroverted that the Business Committee also adopted certain policies and procedures in July of 1987 to be used in the hiring, supervision and disciplining of personnel by Tribal Resolution 86-180.

It is uncontroverted that the Business Committee adopted By-laws by which it is committed to conducting the business of the Tribe and to carrying out its Constitutionally delegated responsibility and authority, (December 5, 1983 Resolution No. 8437). Specifically at Article I thereof, entitled Duties of Officers, said By-laws state as follows:

"(1) All committee members will discharge duties as prescribed by the By-laws".

These same By-laws further limit the scope of Business Committee involvement in staff matters as follows:

"(2) All committee members will refrain from involving themselves in staff administration unless grievance by a staff member has been filed".

It is further uncontroverted that the Business Committee has heretofore adopted an Appeal and Grievance Procedure for employees by Resolution No. 8436, adopted December 5, 1983 defining involuntary termination (dismissal) as follows:

"Involuntary termination (dismissal) - When circumstances so warrant an employee may have to be involuntarily terminated. Such action shall be recommended by the employee's supervisor, and approved by the next higher authority following careful consideration of all aspects of the specific case. A written

notice of termination signed by the employee's supervisor or Program Director which state the reason for dismissal shall be given."

It is also uncontroverted that the Business Committee, on its own initiative and for its own reasons, took the original action to bring about the termination of Appellant and subsequently instructed the Tribal Administrator, Dr. Francis Levier, to carry out their decision.

In order to accept the defense of the Appellees in this case, it would be necessary for this Court to assume that the Citizen Band Potawatomi Indian Tribe is by nature and temperament an arbitrary, capricious body which takes no cognizance of its own laws, policies or other official acts, and which may from day to day ignore or violate same, by a simple majority vote of the Business Committee.

Sovereign immunity cannot, however, be

used to defend violation of or continuing conflict with the Constitution and By-laws of the Tribe. Cudmore v. Cheyenne River Sioux Tribal Council, No. 81-226 (Ch. R. Sx. Tr. Ct., Oct. 9, 1981) 10 I.L.R. 6004. Whether this challenge is raised in the fact of the Tribe's official legislative action, which is itself the offending violation or conflict, or in the midst of administrative action which is the point of offense, this Court is entrusted with the responsibility of making such determination and curing those conflicts.

There was a time, from which we are not far removed, when any learned court or person could say that arbitrary and capricious was the nature of tribal governments generally. Fortunately for many tribal peoples and the governments, including the Citizen Band Potawatomi Indian Tribe of Oklahoma, that time has passed. The Citizen Band Potawatomi Indian Tribe is known as a progressive and

forward looking Tribe, not in small part, due to the leadership of these very individual who are named as Defendants in this action. The Business Committee has led this Tribe into ventures as diverse as the operation of a multi-million dollar bingo enterprise, the ownership and operation of a golf course, and the purchase of the majority interest in a local bank. It is with this more sophisticated view of the business acumen of this Tribal government that this Court should not accept the argument that the action of which the Appellant complains could in no way be seen as anything other than an official act of the sovereign. To the contrary, considering the extensive legislative foundation framed by the General Council, this Business Committee and its predecessors, such an action as taken against this Appellant causes great concern that such action was, in fact, an abuse of official authority in deference to a wide body of law

and regulations designed to ensure that just such actions would not occur. Such purposeful legislation was intended to lend stability to Tribal business and government operations. (See Introduction to Personnel Policy Manual; and introductory language of Resolutions No. 8436, 8437, and 86-166).

At Article 7 of the Constitution, the Business Committee is empowered to "enact legislation, transact business and otherwise speak or act on behalf of the Citizen Band Potawatomi Indian Tribe of Oklahoma . . ." (See Section 2) The Business Committee, as with the General Council of this Tribe, has historically exercised this power through legislation by resolution. Likewise, resolution is required in order to repeal or amend existing legislation and the record is void of evidence that any of the aforementioned law did not continue in full force and effect at the date of Appellant's discharge.

The argument proffered by the Appellees is that a reservation of all Constitutional powers of the Business Committee was clearly stated within the policies and thus supports the Business Committee's action. This argument is not persuasive in light of the absence of a substantial and compelling need for the intervention of the Business Committee in the every day operation of Tribal business normally reserved by the Tribe to the Tribal Administrator (See Resolution No. 86-166 and 8436) and/or official legislative act to amend or modify the previously existing body of law.

No matter how poorly drawn the original complaint of the Appellant might have been, the issue brought before the Tribal Court by that complaint clearly requires the Tribal Court to provide an opportunity for Appellant to bring her proof thereof before the Trial Court on the issue of whether the subject action was "ultra vires." The Tribal Court

is fully capable of determining the lawfulness of the contested action and in separating those damages and remedies to which the complaining party might be entitled, if successful, from those to which no entitlement may be had due to the Tribal government's absence from said action and protections offered by code and the doctrine of sovereign immunity.

It is for these reasons that I would reverse the decision of the Tribal Court and remand for further proceedings on the question of whether the actions of the Defendants in discharging Appellant were lawful exercises of governmental authority or were willful, intentional or grossly negligent acts in violation of law and authority, giving rise to personaL liability therefor.

STEPSON, J. Concurs.

APPENDIX D

CONSTITUTION OF THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

PREAMBLE

We the Citizen Band Potawatomi Indians of Oklahoma, sometimes designated as the Potawatomi Tribe of Oklahoma in furtherance of our inherent powers of self-government, in order to take advantage of the opportunities for economic independence and social advancement offered by the Thomas-Rogers Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967), do hereby adopt this Constitution pursuant to the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967) which shall superseded that constitution approved by the Secretary of the Interior on October 17, 1938, and ratified on December 12, 1938, and amended on September 27, 1956, December 27, 1960, April 24, 1961, September 21, 1970, April 20, 1983, and April 3, 1989,

with ratification.

ARTICLE 1 - NAME

The official name of this Tribe shall be the Citizen Band Potawatomi Indian Tribe of Oklahoma.

ARTICLE 2 - OBJECTIVES

Section 1. The objectives of the Citizen Band Potawatomi Indian Tribe of Oklahoma in organizing under this Constitution shall be:

(a) To promote the general welfare of the Citizen Band Potawatomi Indian Tribe of Oklahoma and its members by exercising to the fullest extent the inherent powers of self-government vested in the Tribe since time immemorial and any additional powers of self-government vested in the Tribe by Federal or state law.

(b) To secure for the Tribe and its members the powers, benefits, rights, and privileges provided for in the Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967).

(c) To secure the powers, benefits, rights and privilege as provided by any laws of the United States now or hereafter enacted for the benefit of Indians or other citizens of the United States.

(d) To secure, for the Citizen

Band Potawatomi Indian Tribe of Oklahoma, a charter of incorporation from the Secretary of the Interior that allows the Tribe to enjoy those powers specifically mentioned in the Oklahoma Indian Welfare Act of June 26, 1936, (49 Stat. 1967).

ARTICLE 3 - MEMBERSHIP OF TRIBE

Section 1. The membership of the Citizen Band Potawatomi Tribe of Oklahoma shall consist of the following persons:

(a) All persons of Indian blood who were bonafide members of the Citizen Band Potawatomi Indian Tribe of Oklahoma and who were enrolled or were entitled to be enrolled on the official census roll of the Band as of January 1, 1937.

(b) Each child of Citizen Band Potawatomi Indian blood born since the date of said roll of whose parents is or was a member of the Band.

(c) Each child of Citizen Band Potawatomi Indian blood of a marriage between a member of the Band and any other person.

(d) As used in the Article, the term "a member of the Band" means a member of the Band at the time of the child's birth, or in the case of a posthumous child, if membership rights are claimed

through the deceased parent, the parent was a member of the Band at the time of death.

(e) The burden of proof as to eligibility for membership in the Citizen Band Potawatomi Indian Tribe of Oklahoma will be on the claimant for membership in each case.

(f) The Business Committee shall have power to prescribe rules and regulations, subject to the approval of the Secretary of the Interior or his authorized representative, covering future membership including adoptions and the loss of membership.

(g) Any member who is enrolled after the effective date of this amendment (April, 1989), who was not otherwise eligible for enrollment, shall not be eligible to participate in the scholarship or prosthetic programs which were developed from Judgment Funds awarded in Dockets 14-K, 29-J, 217, 15-M, 29-K, and 146.

ARTICLE 4 - TRIBAL JURISDICTION

Section 1. The jurisdiction and governmental powers of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall, consistent with applicable Federal law, extend to all persons and to all real and

personal property, including lands and natural resources, and to all waters and airspace within the Indian Country, as defined in 18 U.S.C. § 1151 or its successor, over which the Citizen Band Potawatomi Indian Tribe of Oklahoma has authority.

Section 2. The jurisdiction and governmental powers of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall also, consistent with applicable Federal law, extend outside the exterior boundaries of the Citizen Band Potawatomi Indian Country to any persons or property which are, or as may hereafter be, included within the jurisdiction of the Citizen Band Potawatomi Indian Tribe of Oklahoma under any laws of the Citizen Band Potawatomi Indian Tribe of Oklahoma, any State, or the United States.

Section 3. The jurisdiction and governmental powers of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall be exercised by appropriate legislation enacted

by the Tribe, to establish or provide for a tribal judicial system, a tribal law enforcement agency, and other appropriate administrative agencies of the Tribe.

ARTICLE 5 - CITIZEN BAND POTAWATOMI INDIAN COUNCIL

Section 1. There shall be a Citizen Band Potawatomi Indian Council. The membership of the Citizen Band Potawatomi Indian Council shall be all Citizen Band Potawatomi Indians, 18 years of age or older who have not been adjudged incompetent by a court of competent jurisdiction.

Section 2. The Business Committee shall provide for the Citizen Band Potawatomi Indian Council rules of procedure, subject to this Constitution, by appropriate legislation, and the Citizen Band Potawatomi Indian Council shall exercise such authority and powers as are delegated to it by this Constitution.

Section 3. There is reserved to the

Citizen Band Potawatomi Indian Council the authority to approve all actions of the Business Committee, or to delegate specific authority to the Business Committee to take particular actions, prior to any such action of the Business Committee becoming effective, which results in:

(a) the appropriation and budgeting of available tribal funds held in trust as the proceeds of any claim against the United States or from or as a result of any treaty obligation received from the United States including interest earned thereon for expenditure for the benefit of the Tribe;

(b) the sale of any land or interest in lands, and in connection with the purchase of lands or interest in lands, to authorize and cause to be executed a mortgage or encumbrance covering or extending to property not being purchased;

(c) approval of any settlement of claim of the Citizen Band Potawatomi Indian Tribe of Oklahoma against the United States.

ARTICLE 6 - EXECUTIVE OFFICERS

Section 1. The Executive Officers of the Tribe shall be the Chairman, Vice-Chairman,

and a Secretary/Treasurer who shall serve for four year terms of office and until their successors shall be qualified and installed in office.

Section 2. It shall be the duty of the Chairman to preside at all meetings of the Council and the Business Committee and perform all duties appertaining to the office, and the Chairman shall see that the laws of the Tribe are faithfully enforced. The Chairman shall have general supervision of the affairs of the Council and of the Business Committee.

Section 3. The Vice-Chairman shall perform the duties of the Chairman in his absence or during his incapacity to act, and shall undertake such other duties as may be assigned to him by the Chairman or by law.

Section 4. The Secretary/Treasurer shall correctly record the proceeding of all meetings. He shall make out the order of the business for Chairman, shall notify all

committees of their appointments, shall have custody of the records and all papers of the Council, which records and papers shall be open to inspection during business hours, in his presence, by any member of the Council desiring to read them. He shall keep a correct list of all members of the Council and a correct list of all enrolled members of the Tribe, shall authenticate all accounts or orders of the Council and in the absence of the Chairman and Vice-Chairman, shall call the meetings to order until a chairman pro tem is selected. He shall render a written report at the annual meeting, and at the expiration of his term of office, the records and all papers in his possession shall be turned over to his successor. He shall issue notices of all meetings and conduct all general correspondence, as directed by the Council or Business Committee.

The Secretary/Treasurer shall receive and keep all moneys of the Council and an

accurate account of receipts and disbursements. The Secretary/Treasurer shall keep all tribal moneys entrusted to his care in one or more tribal accounts as may be provided by legislation of the Business Committee, and all disbursements therefrom should be made by check. At any time that such account(s) shall amount to more that $50.00, he shall file a bond satisfactory to the Business Committee and the Commissioner of Indian Affairs. The cost of such bond shall be paid out of tribal moneys.

ARTICLE 7 - BUSINESS COMMITTEE

Section 1. There shall be a Business Committee which shall consist of Executive Officers as provided in Article 6 and two Councilmen who shall serve for four year terms and until their successors be qualified and installed in office.

Section 2. Subject to any limitations in this Constitution, and except for those powers expressly reserved to the Citizen Band

Potawatomi Indian Council by this Constitution, or delegated to another tribal entity by this Constitution, the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Band Potawatomi Indian Tribe of Oklahoma in all matters on which the Tribe is empowered to act now or in the future, including the authority to hire legal counsel to represent the Tribe, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior so long as such approval is required by Federal law.

ARTICLE 8 - RECALL

Section 1. The Business Committee shall enact a Recall and Removal Ordinance establishing the procedures to be followed in consideration of recall actions. Said Recall and Removal Ordinance shall contain the definitions of misconduct in office which shall subject a tribal officer to a recall

election. Thereafter, this ordinance may be amended or repealed only the Council at an election conducted pursuant to Articles 10 or 13 of this Constitution. Such Ordinance shall provide that not more than two recall proceedings may be pending in the court at any time. A recall proceeding shall not include more than one official, unless the court consolidates two or more actions for good cause shown.

(a) There shall be a Grievance Committee which shall consist of three members of the Citizen Band Potawatomi Indian Council. The function of the Grievance Committee shall be to act as a fact finding body and to present the facts the Courts of the Tribe in cases in which the Grievance Committee determines that there is probable cause to believe that misconduct in office has occurred.

(1) The Grievance Committee, pursuant to such procedures as shall be provided in the Recall and Removal Ordinance, shall hear complaints of misconduct in office by members of the Business Committee or Judicial Officers of the Tribe. Upon a showing of probable cause that misconduct in office has occurred, the Grievance committee shall file and prosecute

a civil action in the Court of the Tribe to determine and act upon such complaints, and shall undertake such other duties as it may be assigned by appropriate tribal law.

(2) In any recall action filed by the Grievance Committee, the Court, pursuant to the rules of civil procedure, shall have power, to hear the evidence and to determine whether the act or acts of misconduct in office have been shown by clear and convincing evidence so that a recall election should be held. If the Court determines that a recall election should be held, a two-thirds majority of those voting in a special election held pursuant to Article 12, Section 6, shall be necessary to recall the officer from his office. Any appeal taken of the judgement of the Trial Court ordering a recall election shall be expedited by the Supreme Court.

(b) If the Grievance Committee refuses to bring the action in the court after a complaint is brought before them, the complaining party may proceed individually pursuant to this subparagraph (b) of this Article if he so desires. In the alternative, a complaining party, in his discretion, may bring an immediate court action pursuant to this subparagraph (b) without previous action by the Grievance Committee.

(1) The Court, pursuant to the rules of civil procedure, shall

hear complaints brought by an person alleging misconduct in office by members of the Business Committee or Judicial Officers of the Tribe. The Court shall require, prior to hearing any such actions, that the complaining party post a bond in such amount as the court shall deem proper to guarantee the costs, damages, and attorney fees of the person complained of in the event that the recall action was filed without probable cause to believe misconduct in office had occurred or that the recall action was otherwise filed in bad faith.

(2) In any such recall action, the Court shall have power, to hear the evidence of the complaining party or parties and to determine whether the act or acts of misconduct in office have been shown by clear and convincing evidence so that a recall election should be held. If the Court determines that a recall election should be held, a two-thirds majority of those voting in an election held pursuant to Article 12, Section 6, shall be necessary to recall the officer from his office. Any appeal taken of the judgement of the Trial Court ordering a recall election shall be expedited by the Supreme Court.

Section 2. No person may be recalled pursuant to this Article unless at least one hundred fifty (150) persons cast ballots in

the recall election.

Section 3. Grievance Committee members may be recalled from office according to the same rules and procedures established in the Recall and Removal Ordinance except that the Business Committee shall act in the capacity of the Grievance Committee in such cases.

ARTICLE 9 - REMOVAL AND FORFEITURE

Section 1. Any elective body of the Tribe, and the Supreme Court in the case of any judicial officer, shall remove any of its members from office for misconduct in office, as defined in the Recall and Removal Ordinance, or upon conviction of such member by any Court of competent jurisdiction of a felony or other offense involving dishonesty or moral turpitude, or if such member becomes ineligible to hold his office under this constitution, by a unanimous vote of the remaining members of that body.

Section 2. Such removal action shall be taken only upon proof by clear and convincing

evidence at a formal hearing during which a verbatim transcript and record of the proceeding is made, and at which the party complained of shall have the right to not less than thirty (30) days notice, the right to counsel at his own expense, the opportunity to cross examine witnesses against him, introduce any evidence in his favor, and to otherwise be accorded due process of law.

Section 3. A person removed in such a proceeding shall have the right to appeal the removal directly to the Supreme Court upon the record established at the hearing. During such appeal, which shall be expedited by the Court, the officer shall be deemed suspended but not removed from office until a final decision of the Court. For purposes of this Article, removal of an Executive Officer from the Business Committee shall also be deemed a removal from his Executive Office whether or not specifically stated in the

removal action.

ARTICLE 10 - INITIATIVE AND REFERENDUM

Section 1. The members of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall have the authority to enact legislation consistent with this constitution by petition to the Business Committee bearing the language of the proposed tribal law, the signatures, roll numbers, and current address of at least ten percent (10%) of the Citizen Band Potawatomi Indian Council, residing with the Counties of Pottawatomie, Seminole, Pontotoc, McClain, Oklahoma, Lincoln, Cleveland, Okfuskee, State of Oklahoma, provided, that in the general election upon such proposed legislation which shall be called by the Business Committee within ninety (90) days of the receipt of a valid petition, a majority of the voters who cast ballots in such election vote in favor of the proposed legislation. Notice of such referendum election shall be given to the

registered voters at least fifteen (15) days prior to such election. The Business Committee shall be bound by a vote enacting such proposed legislation into law from the date of the election at which such legislation was enacted until it expires by its own terms or until changed by voters at a subsequent election.

Section 2. The members of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall have the authority to reject any legislative action taken by the Business Committee by referendum petition to the Business Committee bearing the language of the tribal law sought to be rejected, the signatures, roll numbers, and current address of at least ten percent (10%) of the Citizen Band Potawatomi Indian Council, residing within the Counties of Pottawatomie, Seminole, Pontotoc, McClain, Oklahoma, Lincoln, Cleveland, Okfuskee, State of Oklahoma, provided, that in the general

election upon such legislation which shall be called by the Business Committee within ninety (90) days of the receipt of a valid petition, a majority of the voters who cast ballots in such election vote against the legislation as enacted by the Business Committee. Notice of such initiative election shall be given to the registered voters at least fifteen (15) days prior to such election. If the legislation is rejected by such vote, that enactment is null an void as of the date of referendum.

ARTICLE 11 - COURTS

Section 1. The judicial power of the Citizen Band Potawatomi Indian Tribe of Oklahoma is hereby vested in one Supreme Court consisting of seven (7) Justices and such inferior courts as may be established by Tribal law.

Section 2. The Courts of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall be courts of general jurisdiction and shall

further have jurisdiction in all cases arising under the constitution, laws and treaties of the Citizen Band Potawatomi Indian Tribe. The Supreme Court shall have original jurisdiction in such cases as may be provided by law, and shall have appellate jurisdiction in all cases.

Section 3. The Tribal Courts, in any action brought before them, shall have the power of judicial review, in appropriate cases, in order to declare that legislative enactments of the Business Committee or the Council, are unconstitutional under this Constitution or prohibited by Federal statutes and void. In such cases, the Court shall have the authority to declare such act void and to issue injunctive relief.

Section 4. The Supreme Court Justices and Tribal Court Judges shall be selected by the Business Committee and confirmed by the Citizen Band Potawatomi Indian Council at a general election called for that purpose, and

shall serve six (6) year terms and until their successor be duly confirmed and installed. At the expiration of such term, each Justice or Judge may, at his option, be considered for reconfirmation to a new term by the Council.

Section 5. Vacancies in Tribal Judicial Offices may be filled by appointment of the Business Committee for the remainder of the unexpired term. Such appointment shall be valid for not more than one hundred twenty (120) days unless the Citizen Band Potawatomi Indian Council confirms the appointee to complete the remainder of the unexpired term. If no Citizen Band Potawatomi Indian Council election is called to act upon such appointment within the one hundred twenty (120) day period, the appointment of that person shall not be renewed.

Section 6. This Article shall be effective upon enactment of enabling legislation by the Business Committee, and

the installation in office of the first Justices and Judges selected according to this Article. Until this Article becomes effective, the judicial power of the Citizen Band Potawatomi Tribe of Oklahoma shall be exercised by the Court of Indian Offenses for the Anadarko Area Office jurisdiction, provided, that the Business Committee shall have the authority, until the effective date of this Article, to contract for the operation of the Court of Indian Offenses either separately or in conjunction with any other tribe or tribes within the jurisdiction of the Court, or to establish an interim tribal judicial system by legislation pursuant to 25 C.F.R., Section 11.1(d) (1983) or its successor.

ARTICLE 12 - ELECTIONS

Section 1. The Chairman, Vice-Chairman, Secretary/Treasurer and two Councilmen shall be elected for a four year term of office and until their successors be qualified and

installed in office by a majority vote at an election to be conducted by secret ballot, with absentee voting, on the date of the annual Citizen Band Potawatomi Indian Council meeting. All elections shall be conducted pursuant to an election ordinance adopted by appropriate legislation of the Citizen Band Business Committee. At the time of their election they shall be: a member of the Citizen Band Potawatomi Indian Council, not less that twenty-one (21) years of age, reside within the Counties of Pottawatomie, Seminole, Pontotoc, McClain, Oklahoma, Lincoln, Cleveland, or Okfuskee, State of Oklahoma, and not have been convicted of a felony or other crime involving moral turpitude in any court of competent jurisdiction within ten (10) years previous to the date of the election, unless pardoned.

Section 2. No person shall be allowed to run for, or hold, more than one elected tribal position at any one time.

Section 3. In order to provide for staggered terms of office, in the next regular election, following the adoption of this amendment (April, 1989), the Councilman #2 position shall be filled in 1989 for a two (2) year term to 1991, and thereafter for four (4) year terms; the Councilman #1 position shall be filled in 1989 for a three (3) year term to 1992, and thereafter for four (4) year terms; in 1989 and thereafter the Chairman's position shall be filled for four (4) year terms; and in 1990 and thereafter, the Vice-Chairman and Secretary/Treasurer positions shall be filled for four (4) year terms. The Grievance Committee members shall continue to be elected for two (2) year terms of office in the same sequence as in effect at the time this amendment is adopted.

Section 4. The newly elected officers shall be installed immediately upon their election or at such time as may be provided

in the election ordinance approved by the Council, or as soon thereafter as any period provided by law for a challenge to the election has expired or as soon thereafter as any dispute regarding the election be finally resolved as provided by law.

Section 5. The incumbent officers of the date of adoption of this Constitution shall continue to serve until the normal expiration of their terms as provided for in Section 3 of this Article, and the election held upon expiration of those terms shall be the first regular election held pursuant the this Constitution.

Section 6. Special elections for the recall of Tribal officials shall be conducted by an independent Election Board, to be established pursuant to an election ordinance prescribed by the Business Committee and concurred in by the council, on order of the court provided that at least one hundred fifty (150) persons must vote in order for

the recall election to be valid. Other special elections shall be conducted by the Election Board as required in Article 10 or Article 13, or upon request by resolution of the Business Committee.

ARTICLE 13 - MEETINGS OF THE COUNCIL

Section 1. Annual meetings of the Citizen Band Potawatomi Indian Council shall be held on the last Saturday of June of each year for receiving reports and any other business which may come regularly before the Council. The purpose of the Citizen Band Potawatomi Council meetings shall be to give information and to discuss any matter pertaining to the Citizen Band Potawatomi Indian Tribe of Oklahoma. Any actions taken with respect to the authority reserved to the council by this Constitution shall be made only by a subsequent election held in accordance with, and within the time specified in, the election ordinance, which election shall be open to all members of the Council.

Section 2. Such meetings shall be held at the Tribal Office Building designated for that purpose at the Citizen Band Potawatomi Capital Complex south of Shawnee, Oklahoma, unless some other point under the jurisdiction of the Citizen Band Potawatomi Indian Tribe of Oklahoma is specifically designated in the call.

Section 3. Special meetings of the council may be called at the discretion of the Chairman, and shall be called by him upon the written request of the majority of the Business Committee or the written request of one hundred fifty (150) members of the Council.

Section 4. The principal object of the special meeting must be stated in the call for same and may include the words "and for the discussion of other business that may be presented." Unless these words are added, no other business can be discussed except for the object stated in the call. Any actions

taken with respect to the authority reserved to Council by this Constitution shall be made only by a subsequent election held in accordance with, and within the time specified in, the election ordinance, which election shall be open to all members of the Council.

Section 5. Notice of meetings of the Citizen Band Potawatomi Indian Tribe of Oklahoma Council shall be given through all appropriate means by the Secretary/Treasurer of the Business Committee at least ten (10) days prior to the date of such meeting.

Section 6. The agenda for each meeting of the Citizen Band Potawatomi Indian Tribe of Oklahoma Council shall be compiled by the Business Committee. Following completion of discussion on all agenda items other tribal business may be discussed, subject to the requirements of Section 4 of this Article.

Section 7. As required, following the meetings of the Citizen Band Potawatomi

Indian Tribe of Oklahoma Council, the Election Board shall conduct an election pursuant to the election ordinance to decide the issues presented to the Council.

ARTICLE 14 - MEETINGS OF THE BUSINESS COMMITTEE

Section 1. The regular meetings of the Business Committee shall be held on last Thursday in February, May, August, and November unless otherwise provided by resolution.

Section 2. Special meetings of the Business Committee may be called by the Chairman at his discretion, and shall be called by him upon the written request of three (3) members of the Business Committee.

ARTICLE 15 - VACANCIES

Section 1. Any elected officer of the Citizen Band Potawatomi Indian Tribe who, during the term for which he is elected, is convicted of any felony, shall automatically forfeit his office. Any elected officer

found guilty of a misdemeanor involving moral turpitude, gross neglect of duty, malfeasance in office or misconduct reflecting on the dignity and integrity of the tribal government, may be removed from office by majority vote of the Business Committee. Before any vote for removal from office is taken, such member or officer shall be given a written statement of the charges against him at least five (5) days before the meeting of the Business Committee before which he is to appear, and he shall be given an opportunity to answer any and all charges at the designated meeting.

Section 2. The Chairman, subject to the approval of the majority of the remaining members of the Business Committee, whether or not the number of members would constitute a quorum shall have the authority to appoint a person to fill any vacancies in any elective office on an interim basis until the next regular election at which time a person shall

be elected to serve the remainder of the unexpired term or for a new term in its regular order as the case may be.

Section 3. In case of vacancy in the office of Chairman, the Vice-Chairman shall succeed at one to the office of the Chairman until the next regular election at which time the office of Chairman shall be filled for the remainder of the unexpired term or for a new term in its regular order as the case may be.

Section 4. During the period in which the Vice-Chairman serves as Chairman under these circumstances, the Vice-chairman's office shall be considered vacant and he/she shall return to serve the unexpired portion of his/her own term of office (if any) upon election and installation of a Chairman. Should the Vice-Chairman be elected, to the chairmanship, his vacancy shall be filled according the Article 12, Section 1.

ARTICLE 16 - RIGHTS OF PERSONS

Section 1. The Citizen Band Potawatomi Indian Tribe of Oklahoma shall not:

(a) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble or to petition for a redress of grievances.

(b) Violate the rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

(c) Subject any person for the same offense to be twice put in jeopardy.

(d) Compel any person in any criminal case to be a witness against himself.

(e) Take any private property for a public use without just compensation.

(f) Deny to any person in a criminal proceeding that right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor,

and at his own expense to have the assistance of counsel for his defense.

(g) Require excessive bail, impose excessive fines, or inflict cruel and unusual punishment.

(h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

(i) Pass any bill of attainder of ex post facto law.

(j) Deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE 17 - QUORUM

Section 1. Three members of the Business Committee shall constitute a quorum at any meeting.

Section 2. One Hundred Fifty (150) members of the Citizen Band Potawatomi Indian Council shall constitute a quorum to transact business at a meeting. Should a quorum not be achieved at duly-called meeting of the Council, the Business Committee may initiate

a referendum election on any agenda items which require action by the Council under the authority reserved to it by this constitution. Such referendum election shall be conducted pursuant to the provisions of election ordinance.

ARTICLE 18 - TRIBAL ENACTMENTS

Section 1. All final decisions of the Council on matters of temporary interest or matters relating to particular circumstances, officials, or individuals shall be embodied in resolutions. Every resolution of the Council shall begin with the words, "Now, therefore be it resolved by the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma:".

Section 2. All final decisions of the Business Committee on matters of temporary interest or matters relating to particular circumstances, officials, or individuals shall be embodied in resolutions. Every resolution of the Business Committee shall

begin with the words, "Now therefore be it resolved by the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 3. All final decisions of the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma upon ongoing matters necessary to the orderly administration of tribal affairs, or having general or continuing application shall be embodied in ordinances, which may be called statutes. Every ordinance shall begin with the words, "Be it enacted by the Council of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

Section 4. All final decisions of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma upon ongoing matters necessary to the orderly administration of tribal affairs, or having general or continuing application shall be embodied in ordinances, which may be called statutes. Every ordinance shall begin with

the words, "Be it enacted by the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma".

ARTICLE 19 - AMENDMENTS

Amendments to this Constitution may be proposed by a majority of the Business Committee or by a petition signed by thirty percent (30%) of the adult members of the Tribe, and if approved by the Secretary of the Interior, shall be submitted to a referendum vote of the members of the Tribe, and shall be effective if ratified by a majority vote.

ARTICLE 20 - SAVINGS CLAUSE

Any previous ordinances or resolutions enacted by the Tribe shall continue in full force and effect to the extent they are not in conflict with this Constitution unless revoked or amended in the future.

ARTICLE 21 - RATIFICATION

This Constitution, when approved by the Secretary of the Interior and ratified by a

majority vote of the qualified voters of the Citizen Band Potawatomi Indian Tribe voting at an election called for that purpose by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote shall cast their ballots, shall be effective from the date of ratification.

APPENDIX E

CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA
PERSONNEL POLICY MANUAL
INTRODUCTION

OBJECTIVES

The following Tribal personnel policy manual has been adopted to promote the efficient, economic, consistent and fair administration of the Tribal personnel management system. The objectives of this system are:

A. To promote and increase efficiency, responsiveness to the public, and economy in the Tribal service;

B. To maintain the recruitment, selection, and advancement of employees in Tribal service enhancing the attractiveness of a Tribal career and encouraging each employee to give his or her best effort to the Tribe and to the public;

C. To provide fair and equal opportunity for qualified persons to enter and progress in the Tribal service based on merit and fitness as ascertained through fair and practical personnel management methods.

D. To promote the hiring of enrolled members of the Citizen Band Potawatomi Tribe of equal

qualifications to existing Tribal employees as current positions become vacant or new positions become available.

Applicability

These rules apply to all full-time Tribal employees. And employee is any person appointed to a position in the Tribal service. Types of employment are discussed later in this manual.

Dissemination

All Tribal employees shall be informed of the existence of these rules and each department shall keep a manual available to employees.

Amendment

These rules may be changed, supplemented, or superseded at any time at the discretion of the Tribal Business Committee, but no such change or amendment shall apply retroactively to divest any employee of a benefit acquired under these policies prior to such change.

RECRUITMENT, SELECTION AND PROBATION

PERSONNEL RECRUITMENT AND SELECTION

A. Qualifications for Employment

1. The desired qualifications for positions will be made by the Program Director and approved by the Tribal Administrator and/or Business Committee and included as part of the official job description for each position.

2. Before applicants are solicited from outside the organization, consideration may be given to upgrading existing staff by promotion from within the Tribe.

3. If education or experience for a position is required or is included as a requirement, such qualifications may be waived upon approval of the Tribal Administrator. Such a waiver will be confirmed in writing and be maintained in the employee's personnel file.

B. Non-Discrimination and Other Basic

Recruitment and Selection Policies

1. No person in the organization or persons seeking employment by the Citizen Band Potawatomi Indians of Oklahoma, shall be appointed, promoted, demoted, removed, or in any way favored or discriminated against because of religious opinions or affiliations.

2. Every effort will be made to provide equal employment opportunities for persons fifty-five or older.

3. Every effort will be made to provide equal employment opportunities for all eligible applicants. However, the Tribe shall utilize appropriate Indian and Tribal Preference guidelines.

4. Preference and opportunities for training and employment in connection with the administration of Tribal

programs shall be given to Indian applicants where qualifications of applicants are essentially equal.

Employment Eligibility and Criteria

1. The authority granted to members of the Business Committee under the Tribal Constitution shall not be limited in any way by this policy statement. The Business Committee has the legal responsibility, fiduciary duty, and delegated authority to speak and act on behalf of the Tribe in all matters except those specifically exempted by the Tribal Constitution. Specific duties prescribed for the Chairman "general supervision of the affairs of the Council and of the Business Committee" (Article 5, Section 2) confer direct authority over the administrative affairs of the Tribe. (Article 6, Section 4). Conferred by the Constitution is the authority to appoint sub-committees and representatives to act for the Business Committee and its officers. It is

from this authority that the Tribal Administration was created. The Tribal Administrator functions under the authority granted to the Chairman, with the advice and consent of the Business Committee.

A. Nepotism

Because of the "general supervision" provisions of the Constitution, any definition of nepotism as it applies to the Business Committee must be limited to these direct relatives of the Chairman:

Husband	Sister	Sister-in-law
Wife	Son	Brother-in-law
Father	Daughter	Son-in-law
Brother	Mother	Daughter-in-law
Father-in-law		Mother-in-law

B. If, when the Chairman seeks the advice and consent of the Business Committee on an employment or personnel decision, the employee or application is relative (See list in Section A) of a member of the Business Committee, that member shall exempt himself from voting, conferring, or in any way representing or influencing the decisions of the Business Committee in matters relating to that employee and applicant.

C. Within the administrative levels the Tribe and its programs, the Tribal Administrator shall have full supervisory authority over all Tribal and program employees under authority

granted by the Constitution to the Chairman.

D. The Business Committee shall have the authority, under the provisions of the Tribal Constitution, to appoint such sub-committees or representatives as are needed to conduct the affairs of the Tribe from within the membership of the Business Committee itself. These sub-committees or representatives shall fall under the "general supervision" provisions of the Constitutional duties of the Chairman. Should a conflict arise between the duties and authority of the Tribal Administrator and any sub-committee or representative of the Business Committee, the Chairman shall have the authority to resolve the dispute. If the resolution of the dispute should involve removal of a Business Committee member, or his relative (See Section A) from a sub-committee or as a representative, that member shall not vote on the issue and shall agree not to do so prior to accepting the appointment. Wage or per diem determinations for sub-committees or representatives and elected officers of the Tribe shall be made by the Business Committee with no vote cast by any member whose wage is before the Business Committee for a vote.

E. The following restrictions will apply regarding employment of relatives of Tribal employees:

(a) No person shall hold a job on which his or her immediate family exercises supervisory authority or has the authority to order personnel action.

(b) Convictions of a felony or a crime involving moral turpitude may be considered grounds to disqualify a person for employment with the Citizen Band Potawatomi Tribe.

(c) Immediate family members shall not have sequential authority over purchasing, auditing, accounting, or property disposal or custody. Sequential authority shall mean any sequence of approval or validation acts which are followed by another such act designed to provide security from collusion, theft, or embezzlement. Example 1: Approval of a purchase requisition, then a purchase order, then a vendors invoice. Example 2: Approval of inventory count, approval of sales ticket, counting of cash proceeds.

1. Compensation and Promotion

Promotions

A. General Considerations: In filling vacant or new positions, management shall give first consideration to promotion of qualified employees already employed in the Tribe. Promotions are to be given without discrimination on such basis as age, sex, race, religion or national origin. Promotions are based on evaluation of past performance and capacity for the position to

be filled. No employee shall be required to accept a promotion to a position of greater responsibility. No advertisement is needed to fill a position in this manner.

B. Promotion Procedure: Employees wishing to be considered for promotion to a new or vacant position may file an application for that position. However, in cases where it is felt that advertising is the best way to secure the most qualified candidate, it may be advertised.

A. Probation

All full-time employees will serve a probationary employment period of ninety (90) days following their initial appointment. At any time during probation employees may be dismissed without prejudice or right of appeal. The probational period shall be used to closely observe and evaluate the work fitness of employees and to encourage adjustment to their jobs. Continuation of employment beyond the probationary period is

dependent upon satisfactorily meeting the performance standards of that position. Evaluation will be scheduled at the end of the probationary period. All other full-time employees will be evaluated at a span of every 6 months.

A. Posting of Position Vacancies

1. Notices of position vacancies or new positions to be filled shall be posted on the bulletin boards of the Citizen Band Potawatomi Indians of Oklahoma, for a reasonable period before filling the vacancy or new position. In addition to posting vacancy notices in the Potawatomi Tribal building, newspaper advertising may be placed in newspapers within the surrounding program areas. All members of the community shall be given an equal opportunity to be made aware of and apply for vacancies.

B. 1. A time limit during which applications may be accepted for a particular employment opportunity will be determined by the Program

Director. Normally ample time will be established for application acceptance. Other applications for employment may be accepted at any time.

2. Where promotions are made from within the Tribe no advertisement of the position is required.

3. Where the nature and duties of the job warrant it, applicants may be subject to an examination. Any examination shall pertain to those skills which fairly test the capacity and fitness of the candidate to efficiently discharge the duties of the position for which the examination is held. The examination may be oral, written, physical, or any combination of these.

4. In so far as possible and practical, the applicant's former employers, supervisors, education, and personal references may be checked.

5. Reference checks conducted by either telephone or mail shall be documented and

made part of the applicant's file at the time of employment.

6. Applications, whether accepted or rejected, should remain on file for not less than one year, unless otherwise requested by the applicant.

7. All candidates for a position shall be evaluated against requirements as set forth in the job description for the position to be filled.

Job Description

A. Each identifiable position in the organization shall be described in writing by a job description. Each employee of the organization will be provided with a copy of the job description for his/her position when hired and a copy of the description made part of the employees personnel folder. The Program Director will be responsible for developing job descriptions and for ensuring that job descriptions are kept accurate and up-to-date. Interpretation of the scope and

quantity of work shall remain in the purview of the immediate supervisor of any employee unless superseded by higher authority.

Compensation

Each Tribal employee shall be paid a salary and hourly wage in accordance with the compensation levels provided under item 3.

Promotion

A promotion of an employee or a change in his salary or position which involves a salary increase of more than 20 per cent or $2500.00, whichever is smaller, within a single twelve month period must be approved under Item 3 of Employment Eligibility and Criteria

Increases in Pay

Outstanding or meritorious achievements may be awarded by an increase in salary, as approved by the appropriate authority. This salary hike for meritorious service may not affect the awarding of normal pay raises for satisfactory performance and may be rewarded

in addition to norman annual pay raises.

Work Hours and Pay Periods

Unless otherwise specified by the Program Directors, normal working hours for all personnel will be from 8:00 a.m. to 5:00 p.m., daily, with one hour off for lunch, Mondays through Fridays. A normal work week for Tribal employees will be forty (40) hours, consisting of five consecutive eight hour days. Program Directors may schedule a forty hour work week which is best suited to their operations. A salaried employee who works more than a normal forty (40) hour week, with prior written approval of their Program Director, will be granted equal time off. All compensatory time must be taken within 30 days of accrual. There shall be no monetary compensation for accrued compensatory time for any reason. The last day of each bi-weekly pay period is designated as payday for regular Tribal employees. All employees, especially hourly

employees, must take a 15 min. break in the a.m. and p.m. All breaks must accommodate the work schedule of the department. Each employee will be briefed on payroll deduction by the Personnel Director.

Holidays

Office holidays observed by Tribal employees will be New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Columbus Day, Labor Day, Veteran's Day, Thanksgiving Day and Christmas.

When a holiday falls on a regular workday, that day shall be taken off. When the holiday falls on a Sunday, employee's will take Monday off as a holiday. When a holiday falls on a Saturday the employee will take Friday off as a holiday. Hourly employees will receive double time.

Two (2) days of administrative leave may be authorized at the Tribal Administrator's discretion. When it is necessary for a salaried employee to work on a holiday he

will be credited with one and one half days of compensatory leave.

Annual Leave

All regular employees will earn annual leave at the rate of two (2) hours per week. Annual leave may be taken full days (8 hour) increments. Employees may accrue annual leave from date of employment, but no annual leave shall be taken until completion of the standard probationary period.

Only full-time employees shall be allowed to accumulate annual leave. Up to 80 hours of annual leave may be accumulated by each employee. Any hours over 30 days (240 hours) will be lost. Upon termination an employee will be paid for accumulated annual leave up to 80 hours. The employee will start the leave accumulation period each year on the employee's anniversary date. All annual leave, up to 80 hours, not used by the anniversary date will be purchased by the Tribe. No carry over from year to year will

be allowed.

Sick Leave

All regular employees will earn sick leave at the rate of two (2) hours per week. Unused sick leave may be accumulated up to 80 hours, however, employees may not be paid for unused sick leave. Sick leave cannot be carried from one year to the next.

Sick leave may not accumulate while an employee is in a non-pay status.

Whenever possible, application for sick leave will be made in advance Supervisors may require a Doctor's certificate or other evidence as justification for approval, when an absence of two (2) days or more is involved. Notification to the immediate supervisor on a daily basis shall be made by the employee to be eligible for sick leave. Sick leave may be used in the instance of employee's illness, if an illness in the immediate family, that requires his/her presence. In either instance a doctor's

certificate may be required for absences for periods of two (2) consecutive days. Sick leave may be paid for at not to exceed three (3) days for death in the immediate family. Immediate family including husband, wife, son, daughter, mother or father.

Sick leave credits shall not be paid to an employee upon voluntary or involuntary termination under any circumstances.

Absences due to illness, injury, pregnancy, medical or dental care may be charged against accumulated sick leave, then against annual leave, and finally to leave without pay. Any abuse of sick leave policies will be reason for dismissal.

Funeral Leave

Funeral leave may be granted for up to three (3) days when the deceased is a member of the employee's immediate family. Immediate family includes husband, wife, son, daughter, father, or mother. Appropriate time during a working day may be granted for funeral

absence when the deceased is not a member of the employee's immediate family, at the discretion of the Program Director.

Pregnancy

A pregnant employee is expected to make her own decision, in consultation with her physician, as to when she will cease working and when she will return. Satisfactory leave must be arranged that will not impair the continuation of those Tribal functions performed by the absent employee.

The employee shall notify her supervisor at least 30 days prior to her intended departure as to the period of time she expects to be on leave and which type(s) of leave she intends to use. At no time shall maternity leave exceed accrued annual and sick leave. Upon depletion of accrued sick leave and annual leave, said person may enter into a period of leave without pay, at the discretion of the Tribal Administrator. At the discretion of the Program Director, the Tribe reserves the

right to hire a temporary replacement for said person.

Administrative Leave

1. Administrative leave is paid leave which is not charged against annual leave, or sick leave and which is granted for various administrative purposes.

2. Employees who cannot report for work because of inclement weather disaster may be granted administrative absence with pay authorized by the Tribal Administrator.

3. An employee called to jury duty or who appears before or participates in any civil or criminal court proceeding by virtue of subpoena or direction by proper authority shall be entitled to administrative absence. When an employee is subpoenaed in private litigation, the time absent shall be taken as annual leave or leave without pay.

4. An employee shall be allowed sufficient administrative absence, at the discretion of the Program Director, in order to vote in any

official election.

Military Leave

An employee who is a member of the National Guard or any Reserve Component of the Armed Forces of the United States shall be granted military leave to participate in military training. Such employees are required to furnish their Program Director with certification, normally copies of official military orders, that they were called to duty by proper authority. Full-time employees attending annual training shall receive full wages in an amount which shall be equal to the individual's regular salary when the Armed Forces pay and the tribal earning supplement are combined. The Tribe is not liable for expenses when the Armed Forces earnings exceed regular earnings. Required documentation of Armed Forces earnings must be provided by the individual.

Absence Without Pay

1. A Program Director, with approval of the

Tribal Administrator, may grant an employee a leave of absence without pay for good reason upon request. Extended leaves that unreasonably impede the work program of the Tribe may be denied.

Absence Without Leave

1. An employee failing to report for duty or remain at work as scheduled without proper notification, authorization, or excuse shall be considered absent without leave and shall not be paid for the period involved.

2. Absence without leave for more than one (1) eight (8) hour work period in an employee's schedule constitutes abandonment of duties, which may result in dismissal or change of status.

EMPLOYEE EXPENSES

General

Employees shall be reimbursed for expenses incurred in connection with their jobs as provided in this section.

Travel and Transportation

Employees shall be reimbursed for expenses incurred for travel and transportation when on official authorized business for the Tribe Reimbursement shall be at the rate authorized by current Tribal Travel Regulations.

Miscellaneous Expenses

Miscellaneous expenses in connection with official Tribal business will be approved in advance by the Program Director.

Unanticipated expenses may be reimbursed, at the discretion of the Program Director through appropriate channels, without advance approval, but receipts or other evidence of such expenditures will be required before reimbursements will be made.

CONDUCT

Relations with Others

1. All Tribal employees are expected and required to conduct themselves in a manner which will reflect credit upon themselves and upon the Tribe.

2. Employees are expected to be courteous,

tactful, cooperative and respectful with fellow workers, Tribal members, and all other with whom they have contact during the work day.

3. Misconduct would be any conduct that produces unfavorable reflection on the Tribe, inflicts physical harm to fellow employees, or behavior that disrupts normal working conditions.

4. Employees shall express their complaints and dissatisfactions concerning fellow behavior only to their supervisor.

Work Standards

It shall be the duty of each employee to maintain high standards of cooperation, efficiency, and economy in their work. If work habits, attitude, performance, or personal conduct of an employee fall below appropriate standards as judged by their supervisors, the supervisors should point out the deficiencies at the time they are observed. The supervisor shall counsel the

employee in sufficient time for improvement prior to formal disciplinary action. Documentation of such counseling shall be filed in the employee's personnel file.

Political Activity

All employees shall refrain from using their positions or influence in any way for, or against, any candidate for public office. Political activity during work hours and/or on Tribal grounds will be grounds for termination.

Employees will not engage in any tribal political activities upon tribal lands nor while on regular duty hours pursuant to their positions with the Tribe.

Tribal Property

Employees will assume full responsibility for all property, funds, equipment, or supplies entrusted to their care and will, at their own expense, repay the Tribe, in full, for loss or damage attributed to carelessness or irresponsibility. Theft of Tribal property

may result in immediate termination.

Confidential Information

Employees will observe the Federal and State regulations and laws regarding Privacy and Freedom of Information Acts.

Discussion of confidential matters either to another employee not entitled to the information or to a person outside the organization without specific approval of his/her supervisor will be grounds for immediate dismissal and instigation of appropriate Federal Court Procedures.

Employees shall use, in a responsible manner, information gained in professional relationships.

Reporting Misconduct

It is the responsibility of all employees to report any conduct of employees which appears to be illegal or criminal in nature. Confidential reports of such conduct should be made to the Program Director, or through proper channels.

DISCIPLINE AND APPEAL

Grounds

Disciplinary action may be administered for just cause which includes but is not limited to illegal, unethical, abusive, or unsafe acts; violation of Tribal rules, regulations, policies, or procedures; insubordination; inefficiency; neglect or abandonment of duties; participation in prohibited political activity or solicitation; abuse of sick leave or other benefits; tardiness or absence without leave; falsification of official documents or records; unauthorized reproduction or distribution of official records or documents; being under the influence of drugs or intoxicating beverages while on duty; waste, damage or unauthorized use of disclosure of official information, or theft of Tribal property.

Type of Action

A. Disciplinary action shall include oral warning by the supervisor with a witness,

written reprimand, suspension without pay, and dismissal. The specific type of disciplinary action to be taken should be determined by the Program Director in conjunction with the employee's immediate supervisor.

B. A written reprimand shall describe the deficiency or infraction involved and shall state the likely consequences of further unsatisfactory performance or conduct. A copy of the reprimand shall be kept in the employees personnel file.

Suspension

A. For more serious or repeated violations, the employee may be suspended without pay by the supervisor, with approval of the next higher level of supervision for a period not to exceed thirty (30) working days.

B. The suspension notice should describe the deficiency or infraction involved and also advise the employee of an appeal procedure and time limits on filing appeal. The notice

of suspension shall be retained in the employees official personnel file. If after appeal, it is determined that the employee was not guilty of the offense that promoted suspension, his pay and seniority should be restored for time lost during suspension.

Dismissal

An employee may be dismissed for theft of property, false information on employment applications, political activity during work hours, Tribal reorganization, violation of the privacy laws, or violation of the Tribal Personnel Conduct Code (See Conduct).

Involuntary Termination

When circumstances so warrant an employee may have to be involuntarily terminated. Such action shall be recommended by the employee's supervisor, and approved by the next higher authority following careful consideration of all aspects of the specific case. A written notice of termination signed by the employee's supervisor or Program Director

which states the reason for dismissal shall be given.

Lay Offs

A layoff shall be construed as removal from a position because of the abolition of the position due to reorganization, funding, program reduction, or other administrative readjustment. Personnel who are laid-off are eligible for rehiring.

Appeal and Grievance Procedure

Any permanent employee who wishes to appeal a personnel action by any supervisor may file a written appeal with the Tribal Administrator. The Tribal Administrator will interview both the Supervisor and Employee and make final determination. Any further appeal will be through a personal intercession by the Chairman who may choose to present the appeal to the Business Committee. If the Business Committee does not choose to hear the appeal, the decision of the Tribal Administrator is final. Effective date: July 1987

APPENDIX F

RESOLUTION **POTT # 89-49**

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

A Resolution commending Pat Sulcer for creating and producing a consistently high quality tribal newspaper and recognizing her efforts on behalf of the Potawatomi people as demonstrated by the numerous National prized for excellence awarded the Tribal newspaper during her tenure.

WHEREAS, the Citizen Band Potawatomi Indian Tribe of Oklahoma is a federally recognized tribe of American Indians with constitutional authority under the Indian Reorganization Act of 1934 and the Thomas-Rogers Act of 1936; and

WHEREAS, the Citizen Band Potawatomi Indian Tribe of Oklahoma, the largest of the Potawatomi Indian Tribes, has, through a continuation of Potawatomi history and organized self government since time immemorial, sovereign powers inherent in tribal tradition and recognized by treaties with the United States and in the United States Constitution; and

WHEREAS, the Citizen Band Potawatomi Indian Tribe of Oklahoma Constitution and By-laws provide that the Business Committee of the Tribe shall be granted the power to act on behalf of the Tribe in all matters except those relating to claims of treaties with the United States; and

WHEREAS, the Business Committee recognizes the quality of the HOW-NI-KAN newspaper under the editorship of Pat Sulcer; and

WHEREAS, from the first paper published by Pat Sulcer in September 1983 through the present, the HOW-NI-KAN has maintained the same high quality standards of journalistic integrity; and

WHEREAS, the Business Committee recognizes that similar quality papers have much larger staffs and resources; and

WHEREAS, the HOW-NI-KAN has continued to be an award winning newspaper; and

WHEREAS, the Native American Press Association has bestowed numerous awards on the HOW-NI-KAN; **NOW**

THEREFORE, BE IT RESOLVED, that the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma congratulates Pat Sulcer for producing a nationally recognized, high quality newspaper, and for winning numerous awards from the Native American Press Association for excellence in all categories.

CERTIFICATION

We, the undersigned members of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma, do hereby certify that the above Resolution POTT# 89-49, is a true and exact copy as approved on the 15th day of March, 1989, with 5 voting for, 0 opposed, and 0 absent.

John A. Barrett, Jr., Chairman

Jim Young, Vice-Chairman

Bob F. Davis, Secretary/Treasurer

Francis Levier, Committeeman

Hilton Melot, Committeeman

Supreme Court, U.S.
FILED
SEP 2 1993
OFFICE OF THE CLERK

No. 93-272

In The

Supreme Court of the United States

October Term, 1993

PATRICIA K. SULCER,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, ROBERT F. DAVIS, HILTON MELOT, JAMES YOUNG and JOHN A. BARRETT, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW AND STATEMENT

Consistent with Sup. Ct. R. 15.2 and 24.1(a), respondents state that the following question is presented for review: do federal courts have jurisdiction under the Indian Civil Rights Act over a claim for wrongful discharge by a former non-Indian employee of an Indian tribe?

PARTIES

Consistent with Sup. Ct. R. 24.1(b), respondents advise the Court that the caption of the case contains the names of all parties. However, the proper name of the tribe is the Citizen Band Potawatomi Indian Tribe of Oklahoma. James Young was named as a party defendant by the petitioner in the district court. Young was Vice Chairman of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma at the time of the actions of which petitioner complains. However, at the time of suit, Young was no longer a Potawatomi Business Committee member and no appearance was made by him in the district court below. Nevertheless, the district court dismissal order covered all defendants.

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JURISDICTIONAL STATEMENT

Consistent with Sup. Ct. R. 24.1(e), respondents advise the Court that petitioner relies on 28 U.S.C.A. § 1254(1) as the jurisdictional basis for this action. Pet. at 2. Petitioner has not adequately alleged a proper ground for invoking the jurisdiction of this Court. This action arises from the Tenth Circuit Court of Appeals.[1] Thus, the opinion may be reviewed by writ of *certiorari* granted upon the petition of any party to any civil case after rendition of judgment. 28 U.S.C.A. § 1254(1). However, the petition for writ of *certiorari* "shall be deemed in time when it is filed with the clerk of this court within 90 days after the entry of judgment." Sup. Ct. R. 13.1. For good cause shown, a justice "may extend the time to file a petition for writ of *certiorari* for a period not exceeding 60 days." The Tenth Circuit order and judgment in this action was filed February 18, 1993. The 90-day period expired May 18. On or about May 21, petitioner requested an extension of time that was granted in part by Justice White who extended the time to and including June 18. On or about June 21, petitioner requested a second extension of time that was granted extending the time to July 8.

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[1] The caption on the cover of the petition for writ of *certiorari* inaccurately states that it is a "Petition for a Writ of *Certiorari* to the Supreme Court of the State of Oklahoma."

STATEMENT OF THE CASE

Petitioner Patricia K. Sulcer ("Sulcer") is upset because she was fired as an employee of the Citizen Band Potawatomi Indian Tribe of Oklahoma, a federally-recognized Indian tribe with a governing body organized pursuant to federal statutes. The tribe's trust lands are physically located within Pottawatomie County, Oklahoma. The respondents are the tribe itself and four individuals who were members of the Potawatomi Business Committee when Sulcer was fired. Because the individual respondents were sued in their official capacities, all respondents will hereafter be referred to collectively as "Potawatomi."

Sulcer, a non-Indian, was hired by the Potawatomi on or about July 21, 1983. Nearly two years later, on or about March 12, 1985, she resigned or was fired as the Potawatomi public information director. On July 1, 1985, Sulcer was rehired as the Potawatomi Assistant Tribal Administrator. She was not hired under any written contract and was assigned to do various tasks, including to serve as editor of the tribal newspaper, the *How-Ni-Kan*.

On July 26, 1989, the Business Committee met in executive session and voted, three-to-one,[2] to direct the Tribal Administrator, Dr. Francis Levier, who was also a Councilman, to terminate Sulcer's employment. On July 27, Dr. Levier, in his capacity as Tribal Administrator and

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[2] Respondent Bob Davis, (Secretary/Treasurer), Respondent James Young (Vice Chairman) and Respondent Hilton Melot (Councilman) voted "aye." Dr. Francis Levier (Councilman) voted "nay." Respondent John Barrett, Jr. (Chairman) abstained.

acting consistent with directions received from the Potawatomi Business Committee, terminated Sulcer's employment, gave her two weeks' severance pay, 22 hours annual leave pay, and 32 hours of regular pay. Thereafter, Sulcer promptly filed for and received unemployment compensation.

On August 11, Sulcer sued four Business Committee members (Barrett, Young, Davis and Melot) in Potawatomi District Court, claiming that her dismissal was unjust, and praying, *inter alia*, for a temporary restraining order. Subsequently, the four defendants moved to dismiss Sulcer's suit for want of jurisdiction. The Potawatomi District Court ruled that the defendants were immune from suit and granted the motion to dismiss. Sulcer appealed. On September 5, 1990, the Potawatomi Supreme Court issued a decision affirming the dismissal of the district court. *See Sulcer v. Barrett*, 17 Ind. L. Rptr. 6138 (C.B.Pot. S. Ct. 1990).

On July 26, 1991, Sulcer filed this action for damages[3] in federal district court against the same four individuals plus the tribe. Because she did not clearly allege a factual basis to support the statutes referenced in the jurisdictional paragraph of her amended complaint, the Potawatomi moved to dismiss the First Amended Complaint for lack of subject matter jurisdiction and/or failure to state a claim. When this motion was granted on January 27, 1992, Sulcer appealed. On February 18, 1993,

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[3] In her First Amended Complaint, Sulcer made nine specific prayers for relief. All but one seek damages in one form or another. The exception seeks, alternatively, reinstatement to her job.

the Tenth Circuit issued an order and judgment, affirming the dismissal by the district court.

SUMMARY OF ARGUMENT

Federal courts are courts of limited jurisdiction defined by the United States Constitution and by federal statutes enacted consistent therewith. In order to maintain an action in federal court, a litigant must allege grounds to show the existence of jurisdiction under an appropriate federal statute. In the amended complaint, Sulcer simply listed several federal statutes,[4] but did not later provide factual allegations that invoked jurisdiction under the cited federal statutes. Although this deficiency made a response to the amended complaint difficult, none of Sulcer's allegations were sufficient under any of the statutes alleged in the complaint to support a cause of action. Thus, dismissal of Sulcer's complaint was properly affirmed by the Tenth Circuit.

In her petition to this Court, Sulcer has now narrowed her jurisdictional basis to the Indian Civil Rights Act ("ICRA"). The ICRA has not been recognized in any reported decision as the basis for federal jurisdiction over a wrongful discharge action against an Indian tribe. Moreover, this Court has expressly recognized that the

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[4] In Sulcer's First Amended Complaint, the jurisdictional statement read: "Federal jurisdiction is proper in this action pursuant to 28 U.S.C. Sections 1331, 1343, 42 U.S.C. Sections 1983 and 1985; and 25 U.S.C. Section 1301 et seq. (Indian Civil Rights Act)."

only action in federal court against an Indian tribe authorized by the ICRA is a *habeas corpus* action. Consequently, the respondent tribe and the four individuals acting for and on behalf of the tribe are immune from suit.

ARGUMENT

Federal courts are courts of limited jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701 (1982). "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374 (1978).

I. BECAUSE INDIAN TRIBES ARE IMMUNE FROM LAWSUITS IN FEDERAL COURT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY, SULCER'S COMPLAINT WAS PROPERLY DISMISSED.

A. Absent congressional waiver, Indian tribes are immune from unconsented suits.

In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), this Court stated unequivocally:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.

> *Turner v. United States*, 248 U.S. 354, 358, 63 L.Ed. 291, 39 S.Ct. 109 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 84 L.Ed. 894, 60 S.Ct. 653 (1940); *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 53 L.Ed.2d 677, 97 S.Ct. 2616 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But, "without Congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co., supra* at 512, 84 L.Ed. 894, 60 S.Ct. 653.

This Court also has noted: "[T]he common law sovereign immunity possessed by [Indian tribes] is a necessary corollary to Indian sovereignty and self-goverance." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *see generally* Felix S. Cohen, *Handbook of Federal Indian Law* 324 (1982 ed.) [hereinafter Cohen]. The doctrine of tribal sovereign suit immunity was recently reaffirmed by this Court in litigation involving the Potawatomi.

> Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.

Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905, 909 (1991) (citation omitted). Concluding, the *Potawatomi* Court stated:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court,

> and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has constantly reiterated its approval of the immunity doctrine. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'over-riding goal' of encouraging tribal self-sufficiency and economic development." Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at 910 (citations omitted).

The immunity possessed by Indian tribes is similar to that of the United States. Neither sovereign "can be sued without the consent of Congress." *People of the State of California v. Quenchan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) (California suit against tribe dismissed because Public Law 280 [18 U.S.C. § 1162] not waiver of immunity); *see also Enterprise Management Consultants, Inc. v. United States, ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989) (affirming dismissal of suit against Potawatomi). "Indian Nations are exempt from suit without congressional authorization. It is thought the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940).

The defense of sovereign immunity goes to the subject matter jurisdiction of a court. A sovereign "is

immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *see also Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 457, 459 n.2 (10th Cir. 1989). Because Congress has not waived the sovereign immunity of Indian tribes and because the Potawatomi have not consented to this action, the district court properly dismissed Sulcer's complaint.

B. Tribal officials acting in their official capacity possess the sovereign suit immunity enjoyed by Indian tribes.

Indian tribes are not only immune from direct legal action against them without congressional consent, but also are immune from indirect attempts to sue them by naming tribal officers as defendants. *See Weeks v. United States*, 406 F.Supp. 1309, 1325 (W.D. Okla. 1975), *rev'd. on other grounds, Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *see also Kenai Oil & Gas, Inc. v. Dept. of Interior*, 522 F.Supp. 521 (D. Utah 1981), *aff'd.*, 671 F.2d 383 (10th Cir. 1982). However, the actions of the tribal officer must be within the scope of his authority. *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 (10th Cir. 1984) (McKay, J., concurring) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949)). Here, the actions of the Business Committee members were well within the scope of their authority. Pursuant to the Potawatomi Constitution, "the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Band

Potawatomi Indian Tribe of Oklahoma." *C.B. Pot. Const.* art 7, § 2, Pet'r. App. at A-75.

When a suit is brought against a government official, a threshold question is whether the suit is against the official or against the sovereign itself.

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury' or domain, or interfere with the public administration, or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' "

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984) (citations omitted). Here, the relief sought by Sulcer (damage for wrongful discharge and reinstatement) can only be granted by the tribe.

Sulcer argues that *National Farmer's Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) established criteria for "determination of the extent of tribal court jurisdiction versus complete immunity." Pet. at 19. The case cited, however, does not support Sulcer's proposition. *National Farmers* held that a federal district court had jurisdiction under 28 U.S.C.A. § 1331 to determine whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court. *Id.* at 852. In other words, a district court could determine under § 1331 whether a tribal court exceeded the limits of its jurisdiction. *Id.* at 853. This holding is inapplicable to Sulcer's claim for several

reasons. First, as the Tenth Circuit observed,[5] the Potawatomi district court did not exceed its subject matter jurisdiction; rather, the district court refused to exercise jurisdiction. Second, unlike Sulcer, the non-Indian plaintiffs in *National Farmer's* sought an injunction to restrain the execution of a default judgment in tribal court. Here, Sulcer seeks damages against the Potawatomi. Finally, contrary to Sulcer's contention, the *National Farmer's* court did not address the issue of sovereign suit immunity.

Citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949), Sulcer also asserts that "the tribe's immunity is unavailable to the committee members acting beyond their authority." Pet. at 20. This legal conclusion was specifically rejected by both the district court[6] and the tribal court because of the broad constitutional grant of authority to the Business Committee: "the Business Committee is empowered to enact legislation, transact business and otherwise speak or act on behalf of the" tribe "in all matters on which the tribe is empowered to act now or in the future." *C.B. Pot. Const.* art 7, § 2.[7]

Quoting *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct.

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[5] *See* slip op. at 5, Pet'r. App. at A-8.

[6] *See Sulcer v. Citizen Band Potawatomi Indian Tribe*, No. CIV-91-1170-C (W.D. Okla. Jan. 27, 1992) (holding that Sulcer failed to state a claim with regard to alleging that the defendants acted outside the scope of their authority when they terminated her) Pet'r App. at A-19.

[7] *See Sulcer v. Barrett*, 17 Ind.L.Rptr. 6138, 6141 (C.B.Pot. S. Ct. 1990) Pet'r. App. at A-27.

905, 912 (1991), Sulcer also suggests that the Potawatomi should be liable in suits for damages in federal courts. The Potawatomi language does not support Sulcer's claims. The referenced decision involved a challenge by an Indian tribe to a state tax assessment. Specifically, the Court held that the state could not sue the tribe through a counterclaim. Moreover, the *Potawatomi* decision did not indicate that tribal officials would be liable to terminable-at-will employees for damages in federal courts.

II. THE ICRA DID NOT GRANT FEDERAL JURISDICTION OVER A WRONGFUL DISCHARGE ACTION AGAINST A TRIBE NOR WAIVE, EITHER EXPLICITLY OR IMPLICITLY, THE SOVEREIGN SUIT IMMUNITY OF INDIAN TRIBES.

Sulcer's principal contention in her petition is that Congress abrogated the doctrine of tribal suit immunity by enacting the ICRA. However, virtually the identical argument was specifically rejected by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Sulcer accurately notes that a central purpose of the ICRA was to " 'secur[e] for the American Indian the broad Constitutional rights afforded to other Americans.' " *Id.* at 61 (quoting S. Rep. No. 841, 90th Cong. 1st Sess. 5-6 (1967)). However, the *Santa Clara* Court also determined that: "There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted." *Id.* Sulcer is not a tribal member, nor an American Indian, and does not reside in Indian country. Thus, she is not among the class of persons Congress intended to protect by enacting the ICRA. Additionally, the claims

presented by Sulcer in her complaint are far less compelling[8] than those in *Santa Clara* that were insufficient to abrogate the doctrine of sovereign immunity.

A. The ICRA does not provide for federal court jurisdiction over claims of improper discharge by former tribal employees.

The ICRA expressly provides only for federal court jurisdiction over *habeas corpus* claims. 25 U.S.C.A. § 1303 (West 1983). As this Court recognized in *Santa Clara,* the ICRA does not provide for federal court jurisdiction over other types of claims potentially arising under the Act. *Santa Clara* at 58-59; *see also* Cohen at 668. Had jurisdiction over other types of claims been intended, Congress could have expressly provided for them. Even so, at various places in her petition, Sulcer maintains that federal courts should be available for any and all claims under the ICRA. However, Sulcer's contention is contrary to the ICRA's legislative intent, sound judicial policy, and extant case law. *See Santa Clara* at 61.

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[8] In her petition, Sulcer, *inter alia,* alludes to the Potawatomi failure to follow tribal personnel policy manual. Pet. at 22, n.7. Her description is not accurate. The tribal personnel policy manual was not intended to diminish or otherwise adversely affect the power of the Business Committee. The manual governed actions by the tribal administrator and those under the administrator. In any event, Sulcer's claim would be inappropriate. Under the manual, a person objecting to a firing initiates a proceeding by filing "a written appeal with the tribal administrator." Sulcer never initiated any administrative appeal and can hardly now claim to have been denied any rights because the appeal process she did not initiate was not conducted.

Although the ICRA grants federal court jurisdiction over *habeas corpus* claims there is no indication that Congress intended to permit any action for monetary relief. Nevertheless, and without citing any authority, Sulcer suggests that her claims fall under the ICRA. Because of the presumption against implicit waivers of sovereign suit immunity and because there is absolutely no evidence that Congress intended to provide for jurisdiction of monetary claims against Indian tribes and their officers, Sulcer's assertion should be rejected. *See generally Cohen* at 669 ("The interpretation and application of the [ICRA] are largely matters for tribal institutions alone.").

Additionally, the Potawatomi have not waived their sovereign suit immunity, thereby consenting to suits in tribal and federal courts. More specifically, the Potawatomi have not consented to actions for employment-related claims. As a general rule, a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. Furthermore, where Congress has not explicitly provided for a cause of action, courts should be hesitant to find an implicit one. This Court has stated:

> Not only are we unpersuaded that a judicially-sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggests that Congress' failure to provide remedies other than *habeas corpus* was a deliberate one.

Santa Clara at 61-62.

B. Federal courts do not have jurisdiction over wrongful discharge claims made by former tribal employees.

Even if the ICRA waived tribal suit immunity, Sulcer has not identified a statute granting federal jurisdiction over her claim. The decision of the Tenth Circuit affirming the dismissal of Sulcer's complaint was based on two grounds. In addition to recognizing the general doctrine of tribal sovereign immunity, the Tenth Circuit observed that Sulcer did not identify a statute that conferred jurisdiction of her claims upon federal courts.[9] This holding is not challenged by Sulcer in her petition for *certiorari*. Consequently, assuming *arguendo* that Congress abrogated the doctrine of sovereign immunity, the ICRA does not provide a jurisdictional basis for Sulcer's complaint.

Following this Court's decision in *Santa Clara*, the Tenth Circuit decided *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980). In nearly all respects, *Wardle* is similar to the present case. When Wardle was fired after being employed for 17 years, he sued his employer, an Indian tribe, in federal court, alleging violations under the ICRA and various other general civil rights provisions. Affirming dismissal of his action, the Tenth Circuit noted that, although the plaintiff attempted "to invoke several statutory and constitutional bases for his cause of action, his suit stems only from the improper discharge of

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[9] Slip op. 3-6, Pet'r. App. at A-4 – A-10 (holding district court did not have jurisdiction under 28 U.S.C.A. § 1331 or § 1343 and holding that even if tribal officials are not protected by sovereign immunity, there is no cause of action against them under the ICRA in federal court).

employment." *Id.* at 672. Such allegations brought the case "squarely within the provision of Title VII of the Civil Rights Act of 1964." *Id.* Title VII, however, does not apply to Indian tribes. 42 U.S.C.A. §§ 2000e(b)(1), 2000e-2(i) (West 1981); *see also Wardle* at 672. Thus, because Indian tribes are expressly exempt from the provisions of Title VII and because no other federal statute provides for federal court jurisdiction over claims of improper discharge against an Indian tribe, this Court should refrain from finding an implicit cause of action under the ICRA.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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